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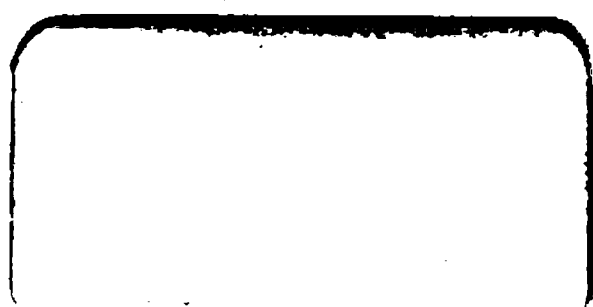
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HOWARD'S
PRACTICE REPORTS
IN THE
SUPREME COURT
AND
COURT OF APPEALS
OF THE
STATE OF NEW YORK.

By R. M. STOVER,
REPORTER.

VOLUME LIX.

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PRACTICE REPORTS.

SUPREME COURT.

ELIZA ANN LONGENDYOK and CATHERINE VAN ORDER agt.
CHARLES ANDERSON.

Right of way — when it exists by grant cannot be lost by non-user nor surrendered by verbal declarations or loose conversations — when by prescription — Action.

In an action brought to prevent an interference by the defendant with the plaintiffs' alleged right to use a road or way across the premises of the defendant, and to compel the defendant to remove obstructions placed by him upon said way to prevent its use by the plaintiffs :

Held, that, as plaintiffs' damages by reason of being deprived of the use of the way would be difficult of estimation in dollars and cents, and as the claimed right to its use by the one party and its denial by the other will be productive of many actions, unless settled by this suit, upon these two well-understood grounds of equitable relief, as well as that of the affirmative relief sought, that the defendant be compelled to remove a cause of continuing injury, the action is maintainable, provided the plaintiffs are entitled to use the road as they insist that they are.

Held, that the plaintiffs have a right of way across the defendant's premises, because: *First*. When the deeds from Frederic Schmidt to the grantors of both parties were given on April 11, 1774, there was a road upon the ground crossing their premises. That road, thus established and used was an appurtenant to the property conveyed by Frederic Schmidt and passed to the grantees therein under the clause which conveys "ways, passages, easements," &c., &c., to the premises belonging "or in any wise appertaining, or therewith used, held, occupied or enjoyed, or reputed, deemed or esteemed as part, parcel or member thereof;" and even without this clause, the right to use the way would have passed as an appurtenant to the property conveyed.

Second. The reservation of a right of way to Spawn and Berger was an easement in their favor. The fee of the land of the road was conveyed to the grantors of the parties to this action. Each parcel bore half of the burden of the road, and if it was located more on one than on the

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other, compensation was made in land. This arrangement and location gives to them a joint right of use as tenants in common of the property, a right exercised by both for a period of more than fifty years, and which use is highly important, not only to show that the construction given by the court to the deed was identical with that given to it by the parties from the earliest recollections of living witnesses, but also to establish a way by use.

Third. The right of way would also pass as an appurtenant to the property conveyed to the grantors of both parties, not only because it was a way established by grants made to Spawn and Berger, and to Paulus Schmidt in 1762, but also because the conveyances to the grantors of the parties to this suit located a road upon the ground the burden of which the properties equally sustain.

Where a right of way exists in favor of plaintiffs by grant, such right cannot be lost by mere non-user. Nor could it be surrendered by verbal declarations and loose conversations, for an interest in land created by deed cannot thus be extinguished.

Where the evidence showed the use of a road or way for a period of more than fifty years, the defendant and his grantors during that period having used the way where it passes over plaintiffs' land, and the plaintiffs and their grantors have used it over the lands of the defendant *for an equal period*:

Held, that mere words of defendant would not amount to acts interrupting the use, and thus used it became a way by prescription.

Greene Circuit, December, 1878.

TRIAL by the court without a jury.

J. I. Werner and J. A. Griswold, for plaintiffs.

Mr. Halleck and R. E. Andrews, for defendant.

WESTBROOK, *J.* — The action is brought to prevent an interference by the defendant with the plaintiffs' alleged right to use a road or way across the premises of the defendant, and to compel the defendant to remove obstructions placed by him upon said way to prevent its use by the plaintiffs.

As the plaintiffs' damages by reason of being deprived of the use of the way would be difficult of estimation in dollars and cents, and as the claimed right to its use by the one party

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and its denial by the other will be productive of many actions, unless settled by this suit, upon these two well-understood grounds of equitable relief, as well as that of the affirmative relief sought, that the defendant be compelled to remove a cause of continuing injury, this action is maintainable, provided the plaintiffs are entitled to use the road as they insist that they are.

The lands of both parties are situate in the town of Catskill, Greene county, and are, as is apparent from the conveyances put in evidence, and the recitals in them contained, a part of premises which formerly belonged to a Mrs. Jannetie Hageman, and which whole track, when owned by her, extended from Hudson's river upon the east, to the Westbergh on the west, a distance of about two and a-half miles.

Mrs. Hageman, on October 18, 1759, conveyed the property to her two sons, Dennis Hageman and Jacobus Hageman, who, on December 29, 1760, divided the same equally between them. These facts are evidenced, not only by recitals in the deed from Jacobus Hageman to Spawn and Berger, dated June 12, 1762, but, also, so far as is material for the purposes of the case, by those in the deed from Frederick Schmidt and wife to Johannis Sax and wife, dated April 11, 1774, and also by those in the deed from Frederick Schmidt and wife to Nicholas Trumbour and wife, likewise dated April 11, 1774, the recitals in which last-mentioned deeds are evidence in this action.

Jacobus Hageman conveyed the part which fell to him in the division with his brother Dennis, to Philip Spawn and Johannis Berger, by deed dated June 12, 1762, which deed was produced in evidence.

Dennis Hageman conveyed his half to Paulus Schmidt on the same day that his brother conveyed to Spawn and Berger. This deed was not produced, but this fact appears from the recitals in the deed from Frederick Schmid and wife to the grantors of plaintiff, and also in that to the grantors of defendant.

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The conveyance of Jacobus to Spawn and Berger was of land upon the river and upon the Kalchbergh, and a right of way was reserved across it unto Paulus Schmidt, his heirs and assigns, from said Schmidt's land to the river, and a right of way was conveyed to Spawn and Berger, their heirs and assigns across Schmidt's lands to the lot upon the Kalchbergh.

The conveyance from Dennis Hageman to Paulus Schmidt, which is not produced, but which also conveyed lands on the river and at the Kalchbergh, must have contained a similar reservation for the benefit of Spawn and Berger, and a similar grant to enable Schmid to cross those of Spawn and Berger. This is apparent not only from the location of the premises of both grantees (Paulus Schmidt, and Spawn and Berger), which, as both owned lands on Hudson's river and at the Kalchbergh, made a road for each across the other necessary, and as both deeds (that from Jacobus to Spawn and Berger, and that from Dennis to Paulus Schmidt) bore date on the same day, the improbability, in view of equal necessity to each, that a road should be given to the one and not to the other, but also from the facts, that whilst the deed to Spawn and Berger expressly reserves a way for Paulus Schmidt across the premises conveyed to the former, it also conveys a right of way to Spawn and Berger across the lands of said Schmidt, which right to and in Spawn and Berger, Frederick Schmidt, the son of Paulus, expressly recognizes and concedes, by the reservation in their favor contained in both the deeds given by him under which the parties to this action hold.

As early then as June 12, 1762, a way or road was provided for extending from the Kalchbergh, on the west, to Hudson's river, on the east, and crossing the lands now owned by the plaintiffs and the defendant. Such way, as previously remarked, was an actual necessity both to Spawn and Berger and to Paulus Schmidt, the father of Frederick. From the antiquity of the transaction it is impossible to say whether or not such road was permanently located prior to April 11, 1774, on which day, by two separate deeds, Frederick Schmidt,

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the son of Paulus Schmidt, conveyed to Johannis Sax and Margaret, his wife, the southern half or moiety of the Paulus Schmidt purchase, and to Nicholas Trumbour and Elizabeth, his wife, the northern half or moiety, "the whole," as both deeds declare, "into two equal parts to be divided." The plaintiffs claim under Sax and the defendants under Trumbour.

By these deeds the grantors in each also obtained land at the Kalchbergh and lands and privileges at and upon Hudson's river. In each was granted a right of way to cross lands not conveyed, to enable them to reach the river, an express grant of "ways, passages, easements, profits, advantages, commodities, rights and appurtenances whatsoever, to the said moieties of the three several lots and premises hereby granted and released, belonging or in anywise appertaining or therewith used, held, occupied or enjoyed, or reputed, deemed or esteemed as part, parcel or member thereof;" and also a clause providing as follows: "Always saving and reserving a road for Philip Spawn and Johannis Berger, their respective heirs and assigns, from the landing place at Green Island to the Kalchbergh, and if one-half of the road cannot be conveniently laid on the northern moiety or half part, and the other half on the southern moiety or half part, in that case the parties holding said part are to allow land in compensation to the party who shall have the greater part of the road, so much as is above the one-half, so that it may always be understood, and it is the intent and meaning of these presents that each half lot shall bear half the road, or allow land in compensation for the same."

As already stated the deeds from Schmidt bear date in 1774. When they were given, as has also been previously mentioned, a right of way had been granted to Spawn and Berger, across the premises now owned by the parties to this suit, and another to their (plaintiffs' and defendant's) source of title, Paulus Schmid over that of Spawn and Berger, so that there was either an actual, continuous way upon the ground, or one to be so constructed, extending from Hudson's river to the

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Kalchbergh. The conveyances from Schmid, on 11th of April, 1774, located that road across the premises of the parties to this action, and placed it one-half on the lands of the plaintiffs and one-half on lands of defendant, wherever the make of the ground would allow, and if more land was taken from one moiety than the other, then the party giving the greater quantity of land for the road was to be compensated by land taken from the other, so, to use the language of the two conveyances, "that each lot shall bear half the road."

As early as 1828, or 1829, there was a road, in fact, upon the ground extending from Hudson's river to the Kalchbergh. Where it crosses the lands of the parties to this action it runs generally upon the line between them. It sometimes is entirely on the land of the plaintiffs, and sometimes wholly on the land of the defendant. According to the evidence of Robert Hood, the engineer who surveyed and mapped it, "taking its whole length across the lands of parties, the road takes about as much land from one as it does from the other." At the point where the dispute has arisen the road is wholly upon the land of the defendant, and it had to be located there by reason of a ledge of rocks. This road has been used by both parties, and their predecessors, more or less, down to the present time; the defendant and his grantors passing over that part which is on plaintiff's lands, and the plaintiffs and their grantors over that which is on defendants.

From the facts which have been thus fully stated, it seems to be clear that the plaintiffs have a right of way across the defendant's premises, because :

First. When the deeds from Frederick Schmidt to the grantors of both parties were given on April 11, 1774, there was a road upon the ground crossing their premises from the river to the Kalchbergh. The expression "*was*" is used, because the deeds to Spawn and Berger and to Paulus Schmid provide for one, and that, in equity, *is* done which *must* be done, or which parties have agreed should be done. That road thus established and used, as it must have been by both

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Spawn and Berger and Paulus Schmidt, to pass from the river to the Kalchbergh, was an appurtenant to the property conveyed by Frederick Schmidt, and passed to the grantees therein under the clause which conveys "ways, passages, easements," &c., &c., to the premises belonging "or in anywise appertaining or therewith used, held, occupied or enjoyed, or reputed, deemed or esteemed as part, parcel or member thereof;" and even without this clause, the right to use the way would have passed as an appurtenant to the property conveyed (*Huttemeier* agt. *Albro*, 18 *N. Y.*, 48; *Lansing* agt. *Wiswall*, 5 *Denio*, 213). It is true that the reservation in words is for the benefit of Spawn and Berger only, but Schmidt, as the owner of the land, had also the right to use it, and as that part of the road which was on his (Schmidt's) land joined on that which crossed Spawn and Berger's premises, to use which he had the right, and as thereby a continuous road was made, it is apparent that the whole way was used, as it was clearly intended to be, as an appurtenance, and therefore passed by Frederick Schmidt's conveyances.

Second. The reservation of a right of way to Spawn and Berger was an easement in their favor. The fee of the land of the road was conveyed to the grantors of the parties to this action. Each parcel bore half of the burden of the road, and if it was located more on one than on the other, compensation was made in land. It is hardly worth while to argue the proposition, that where a road is laid upon the line of lands of A and B for the benefit of C, the owners of the adjacent properties, each furnishing one-half of the road, could use such road as owners in common thereof. And what is true as to the rights of such owners in the supposed case, is also true of those of the parties to this action. The road is taken from the land of each just as much so as if it was so located that the division line between their lands was the center of the road, for the excess of land taken from the one for the road, if there be any, has been compensated for in land taken from the other. This arrangement and location

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gives to them a joint right of use as tenants in common of the property, a right exercised by both for a period of more than fifty years, and which use is highly important, not only to show that the construction given by the court to the deed was identical with that given to it by the parties from the earliest recollections of living witnesses, but also to establish a way by use.

Third. The right of way would also pass as an appurtenant to the property conveyed to the grantors of both parties, not only because it was a way established by grants made to Spawn and Berger and to Paulus Schmidt in 1762 as stated in proposition one, but also because the conveyances to the grantors of the parties to this suit locate a road upon the ground the burden of which the properties equally sustained. That, in equity, as before stated, which *must* be done *is* done. Would it be seriously argued, that if a road on the line of the two properties, and taken one-half from each, had existed when Frederick Schmid conveyed to the predecessor of these parties, that each would not have the right to its use under the clause which grants the use not only of all ways "appertaining" to the property, but of all "used, held, occupied or enjoyed, or reputed, deemed or esteemed as part and parcel, or member thereof?" The concession, which must be made in answer to the question necessarily concedes the case. In equity, and this is an equitable action, the deeds must be construed as if that had been done which the deeds provide for. We are to assume that the road, which the deeds order, was laid. It is to be regarded as one taken from both properties equally, and so located as to be of the greatest convenience to both. Not only was it a convenience, but the location of the properties shows it was a necessity to both. It is true that to Spawn and Berger was reserved the right to use it, but such right is not declared to be exclusive, on the contrary to the grantees in the deeds, in which such reservation was made, was given the fee of the land, each sustaining half the burden of the road, and then, as if placing its fee in both

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was not sufficient to secure its joint use, and in order to free the case from all question and doubt, each deed provides for the use by the grantee therein named of all roads, ways and easements, in language so full and copious that nothing can be added. If, when the deeds are to be read as if the way which they provide for was constructed at the time of their execution, and so they must be read under the well-known equitable maxim referred to, a right of way does not pass to the grantees of each deed, their heirs, and assigns, then language is powerless to express thought.

Having reached the conclusion that a right of way exists in favor of the plaintiffs by grant, it is scarcely necessary to pursue the discussion of other questions. It is sufficient to say that such right could not be lost by mere non-user (*Jewett* agt. *Jewett*, 16 *Barbour*, 150, 157; *White* agt. *Crawford*, 10 *Massachusetts*, 183; *Arnold* agt. *Stevens*, 24 *Pickering*, 106; *Smyles* agt. *Hastings*, 22 *N. Y.*, 217, 224; *Pope* agt. *O'Harra*, 48 *N. Y.*, 446, 452). Neither could it be surrendered by verbal declarations and loose conversations, for an interest in land created by deed cannot thus be extinguished.

The attempt will not be made to discuss fully the question of a way by user. The evidence shows such use for a period of more than fifty years. The defendant and his grantors, during that period, have used the way where it passes over plaintiffs' lands, and the plaintiffs and their grantors have used it over the lands of the defendant for an equal period. Mere words of defendant would not amount to acts interrupting the use (*Miller* agt. *Garlock*, 8 *Barbour*, 153; *Robinson* agt. *Phillips*, 56 *N. Y.*, 634). Thus used it became a way by prescription.

The result of my examination is that plaintiffs are entitled to judgment as asked for in the complaint.

Nidig agt. National City Bank of Brooklyn.

COURT OF APPEALS.

EDWARD NIDIG, plaintiff and respondent, agt. THE NATIONAL CITY BANK OF BROOKLYN.

Duty and negligence of collecting agent.

An out of town note or draft deposited with a bank for collection may be sent by mail to the bank on which it is drawn or made payable, provided that be the ordinary method of transacting such business. Such first-mentioned bank is authorized to surrender the note given for collection to the bank upon which it was drawn on receiving its draft for the amount.

In an action against a bank for negligence, while acting as a collection agent, it is incumbent on the plaintiff to prove in what respect the defendant has been negligent. So long as the collecting agent has pursued the ordinary and reasonable methods of making the collection, it is free from fault. What is sufficient evidence of agency considered. The effect of not presenting a note or check payable at the particular place where it is payable discussed and explained. Payment made by check or note, when inoperative if such check or note be dishonored. Effect of failure of the bank pending the collection. Insolvency must be proved and will not be presumed.

Decided February 24, 1880.

THE plaintiff sued the defendant, in the city court of Brooklyn, to recover \$1,009.90, damages, for gross negligence in and about the collection of a promissory note for that amount.

The defendant, in answer to the complaint, alleged that the promissory note was delivered to the defendant as a banking institution for the purpose of having the defendant send the same through the mail to the Bank of Lowville, at Lowville, in the state of New York, where the said promissory note was made payable ; that said promissory note was so delivered to the defendant on about the 21st day of December, 1877, and that the defendant forwarded the same by mail to the said

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Bank of Lowville on the said 21st day of December, 1877, and that the defendant, on the 29th day of December, 1877, received by mail, from the said Bank of Lowville, a draft in the words and figures following on account of said promissory note :

New York.

{ United States two cent }
stamp, canceled. }

BANK OF LOWVILLE, LEWIS COUNTY,
\$1,008.65. LOWVILLE, *December* 28, 1877. }

German American Bank, New York, pay to the order of A. A. Rowe, cashier, ten hundred and eight ~~100~~⁶⁵ dollars.

No. 13460.

E. H. BUSH,
Cashier.

That the said draft was received by defendant on Saturday afternoon, December 29, 1877, after 3 o'clock; that the defendant sent the said draft with its other exchanges in the usual course of its business, to the clearing-house in the city of New York, on Monday morning, December 31, 1877, and that it was returned to the defendant through its clearing-house agent in the usual course of its business on the 2d day of January, A. D. 1878, with a ticket attached on which were printed the words "not good;" that the defendant immediately gave notice of the non-payment of said draft to the plaintiff, and that thereupon the plaintiff gave to the defendant his check for \$1,008.65 to counter-balance the credit for that amount which the defendant, on the 29th day of December, 1877, on the receipt by mail of said draft, had given to the plaintiff.

The trial judge held that there was no positive proof of actual negligence on the part of the defendant, and that none could be inferred from the evidence, and thereupon dismissed the complaint, with costs.

The plaintiff appealed to the general term where the judgment of nonsuit was reversed and a new trial ordered.

The defendant, thereupon, appealed to the court of appeals.

Nidig agt. National City Bank of Brooklyn.

W. H. Hollis, for defendant and appellant.

Blumensteil & Ascher, for plaintiff and respondent.

RAPALLO, *J.*— The note, which was placed by the plaintiff in the hands of the defendant for collection, was payable at the Bank of Lowville, and it was, consequently, the duty of the defendant to present it to that bank for payment. The first question which arises in the case is, whether the defendant was guilty of any negligence in the manner of presentment, from which the plaintiff sustained damage. It must be borne in mind that there were no indorsers on the note, and that all that was to be done was to demand payment. The defendant, instead of sending the note to an agent or correspondent at Lowville for presentment, sent it by mail directly to the bank where it was payable. This appears to be an ordinary method of transacting such business, and the defendant was bound only to adopt the ordinary mode. It is sanctioned in England in the cases of *Heywood agt. Pickering* (9 *L. R. Q. B.*, 428); *Prideaux agt. Cuttle* (*L. R.*, 4 *Q. B.*, 461); *Bailey agt. Bodenham* (16 *C. B. N. S.*, 295); *Hare agt. Huntley* (10 *C. B. N. S.*, 65); and in this state in *Shepsey agt. Bowery National Bank* (59 *N. Y.*, 485). But, however this may be, no injury appears to have resulted from this mode of presentment, for the note reached the bank on the twenty-seventh of December, the day it was due, and the bank recognized the presentment by remitting a draft in payment. The loss occurred through the subsequent failure of the bank, and the consequent non-payment of this draft. The same result ensued which would have taken place if the defendant had sent the note to a third party as sub-agent for collection. Such sub-agent would have been authorized, under the circumstances of the case, to surrender the note to the bank on receiving its draft on New York, because the proceeds were not to be used in Lowville but to be transmitted to the defendant in New York or Brooklyn. There is no proof in the case

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that if the note had been presented by a third party at the counter of the bank at Lowville it would have been paid in cash, but assuming that it would, it would have been the duty of the agent to transmit the funds to the defendant, and a proper method of doing this would have been to purchase a draft on New York. There being nothing in the case to show that the Bank of Lowville was not in good credit at the time, the sub-agent would have been authorized to purchase its draft with the proceeds of the note. Instead of going through these useless formalities he might properly have taken the draft in the first instance. No damage was caused, therefore, by not employing a sub-agent. Besides it appears to be a usual mode of transacting such business to collect paper payable at a bank at a distance in the manner which the defendant adopted.

The draft was not sent forward until the twenty-eighth. But it does not appear that this was an unreasonable delay, nor was it even shown that there was any mail after business hours on the twenty-seventh by which the draft could have been sent. The bank of Lowville was entitled to the whole of the business day of the twenty-seventh within which to pay the note.

Up to this stage no negligence on the part of the defendant is shown. Then was there any shown in collecting the draft? At what time the defendant received the draft, or what was done with it, appears only from the admissions in the answer, which show that the defendant received the draft on Saturday, December twenty-ninth, after business hours, and sent it in the usual course of business to the clearing-house in the city of New York on Monday morning, December thirty-one, and it was returned to the defendant through the clearing-house in the usual course of business on the second of January, not good. It also appears that the defendant gave immediate notice of non-payment to the plaintiff.

The allegation of negligence lies at the foundation of this action, and it is incumbent upon the plaintiff to point out in

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what respect the defendant has been negligent. So long as it has pursued the ordinary and reasonable methods of making the collection, it is free from fault; and we fail to see in what respect they have been departed from. Sending the draft through the clearing-house for collection was the usual and proper mode (*Turner agt. Bank of Fox Lake, 3 Keyes, 425*). The plaintiff, however, resorts to another ground of liability, and contends that by sending the note to the Bank of Lowville the defendant constituted that bank its agent to receive payment of the note, and is therefore liable for the proceeds as having been received by the Bank of Lowville, the last-named bank being deemed to have received the proceeds by charging the amount of the note against its customer, the maker, and by this circuitous mode of reasoning the defendant is sought to be made liable for the solvency of the Bank of Lowville. We do not think that any such agency was created. The note, in so far as relates to its presentment at the bank, and the duties of the bank in respect to it, was equivalent to a check drawn by the maker upon the bank where the note was made payable (*Ætna Ins. Co. agt. Fourth National Bank, 46 N. Y., 88*). The bank owed a duty to its customer to pay it on presentation, if in funds. The defendant used the United States mail as its messenger to make the presentment, and by this means caused it to be presented to the bank for payment on the day when due. It did not deposit it there for collection. If there had been indorsers, it might be argued that the defendant constituted the Bank of Lowville its agent to notify the indorsers of non-payment; but even this is very questionable, for it was held in a similar case that if the proceeds were not remitted the paper should be deemed dishonored and notice of non-payment should be given by the bank which had sent it (*Bailey agt. Brodenham, 16 C. B. [N. S.], 288*). No such question arises, however, in the present case, for there were no indorsers. The defendant, by sending the note to the Bank of Lowville, requested it to pay it, not to receive the proceeds. The object of sending was to

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extract money from the bank as agent of the maker of the note, not to put money in the bank as agent of the defendant, or to the credit of the defendant. There is nothing in the nature of the transaction which should render the defendant guarantor of the solvency of the Bank of Lowville. It was recently held by this court in the case of *The People agt. The Merchants and Mechanics' Bank of Troy*, decided October, 1879, that by sending a check through the mail to the bank on which it was drawn, the sender did not constitute that bank its agent to receive the proceeds; and as before said a note payable at a bank where the maker keeps his account is equivalent to a check drawn by him upon that bank, except that in the case of a note the failure to present for payment does not discharge the maker. But as far as the question now under consideration is concerned, the effect is the same. The bank on which the note is drawn has nothing to do but to pay the note if in funds, and if not refuse to pay. If it pays, it does so in behalf of the maker and no relation is created between it and one who presents it by mail different from that which would exist if presented through any other agency, unless accompanied by a request to do some further act in behalf of the sender, beyond complying with its duty to its own customer.

The case is also defective in respect to the question of damages. It is by no means clear that the maker of the note is discharged. Where a note is payable at a bank an entire failure to present it for payment does not discharge the maker (*Walcott agt. Van Santvoord*, 17 *Johns.*, 248; *Green agt. Goings*, 7 *Barb.*, 652; *Caldwell agt. Cassidy*, 8 *Cow.*, 271). If the maker has not sufficient funds in the bank, the omission to present it is of no consequence. If he has funds there, he can plead it by way of tender and is relieved from liability only for interest and costs, and even if the bank fails with the funds in its hands this is no defense to the note (*Ruggles agt. Patten*, 8 *Mass.*, 480; *Fenton agt. Goudry*, 13 *East*, 473; *Turner agt. Haydon*, 4 *Barn. & Cress.*, 1). The bank is, in

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such cases, regarded simply as the agent or depository of the note or acceptor of the bill, and he alone suffers by its failure, and his promise to pay is not discharged. In this respect only a note or bill payable at bank differs from a check. Therefore, if there had been no presentment whatever, and the bank had failed with sufficient funds of the maker in its hands to pay the note, the maker was still liable.

The attempt of the bank to pay the note by a draft which was not good was no payment, and on notice of the non-payment of the draft the plaintiff could have tendered it back and demanded his note, or could have sued upon the note, even without giving indemnity, as the note was in the possession of the maker, having been returned to him by the bank. The plaintiff could not even set up, in bar of costs and interest, that he had the money in the bank; for his account was short, and was not made up until after the bank had failed. Neither was the maker misled by anything that had been done, for the bank failed on the same day that he received back his note by mail, and he was at a distance and could have done nothing if he had known that the note was not paid. There was no evidence that the maker was not solvent, or that the plaintiff had sustained any damage.

On both grounds we think the order appealed from should be reversed and the judgment of nonsuit affirmed.

FOLGER and ANDREWS, JJ., concur. CHURCH, Ch. J., concurs on question of damages. MILLER, EARL and DANFORTH, JJ., dissent.

NOTE. — A motion for a reargument was subsequently made and denied.
[REP.]

Royal Baking Powder Company agt. Sherrill *et al.*

SUPREME COURT.

THE ROYAL BAKING POWDER COMPANY agt. GEORGE
SHERRILL *et al.*

Trade-mark—when a word becomes property and its use as a trade-mark will be protected.

Where the case clearly shows that the plaintiffs and those through whom they claim were the first to use the word “royal” as a portion of their trade-mark in connection with flavoring extracts, and have continued its use for a considerable number of years:

Held, that, such appropriation of this word, although it is a common one, to distinguish an article produced by them, and although it is only applied to one grade of the article they manufacture, but by which distinctive appellation it has come to be known, dealt in, and used, gives to the plaintiffs the right to its exclusive use in respect to such production and such right will be protected.

Special Term, January, 1880.

James W. Gerard, for plaintiff.

C. M. Marsh, for defendant.

VAN VORST, *J.*—The case clearly shows that the plaintiffs and those through whom they claim were the first to use the word “royal” as a portion of their trade-mark in connection with flavoring extracts; and that its use has been continued by them ever since the year 1868.

Such appropriation of this word, although it is a common one, to distinguish an article produced by them, and although it is only applied to one grade of the article they manufacture, but by which distinctive appellation it has come to be known, dealt in, and used, gives to the plaintiff the right to its exclusive use in respect to such production.

If the defendant produces a kindred article he should desig-

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nate it by some other distinctive word or character, and not appropriate to himself a term by which the plaintiff's article is peculiarly known and distinguished.

Natural justice suggests such course. The defendants' article is put up in packages quite similar to those of the plaintiff, and it can be readily understood that the defendants' use of the word "royal," although followed, as it is, by the term "standard," is calculated to mislead purchasers who call for the "royal" extract.

The word "royal" in regard to an article produced by one manufacturer, when a similar article is also produced by others, may get a reputation, and go into use in connection with that word. In such case the word itself becomes property, to the extent above indicated, to the one who first distinctly appropriates it to his use. Such seems to be the case with the plaintiff's article in connection with the word "royal." Plaintiffs ought not to lose the advantage of their appropriation of this word through the action of others whether designed or unintentional.

The fact that the defendants had used the word "royal" in connection with a grade of mustard made by them, gives no right to its use to designate a flavoring extract after the plaintiff had first distinctly adopted the use of the word for such other production.

Prior in time, prior in right. There should be judgment in favor of plaintiff, restraining the use by the defendants of the word "royal," singly or as qualifying any other words to designate flavoring extracts.

The People *ex rel.* Beattie agt. McAdam.

SUPREME COURT.

THE PEOPLE *ex rel.* MARY A. BEATTIE agt. DAVID McADAM,
justice, &c.

*Summary proceedings for non-payment of rent — when may be maintained
by lessor.*

The acceptance of a chattel mortgage postponing the payment of past due installments of rent upon a lease, and securing the payment of the subsequent installments of rent as they mature, does not prevent the lessor from maintaining summary or other proceedings founded on a default in the payment of the subsequently accrued installments.

Special Term, May, 1880.

THE relator was dispossessed from the premises No. 7 Washington place, by Mr. justice McADAM, for the non-payment of certain installments of rent secured by a chattel mortgage. The justice decided the rule to be as stated in the head-note. The adjudication was brought into the supreme court for review upon *certiorari*. The respondent moved to quash the writ.

Ormsby & Fitzpatrick, for relator.

Ira A. Warren, for respondent.

BEACH, J. — The proceedings were taken on account of rent unpaid from January 1 to April 1, 1880. They were not based upon the sum accrued prior to January one. That was specifically secured by the chattel mortgage and its payment deferred until 1881. All reference to the rent, mentioned here, in the mortgage is as follows: The party of the first part shall well and truly pay "such other or further sum or sums as may remain due and unpaid for the rent of premises * * * from January 1, 1880, to May 1, 1880," &c., &c.

Clafin *et al.* agt. Baere.

The date in 1881 is named for the payment of the first installment of the \$453.02 in arrear, and has no connection with paragraph above quoted. I am unable to discover any postponement of the rents in question. The mortgage merely secures whatever balance may remain still due at the end of the term. The logical sequence of any other contention would enable the relator to remain in possession, without payment, until January 15, 1881, then to begin paying at the rate of twenty dollars per month. Such a variation of the written lease could not be made, except by clear and unambiguous words. The writ must be dismissed.

COURT OF APPEALS.

HORACE B. CLAFLIN *et al.* agt. JULIUS BAERE and LOUIS BAERE.

Appeal—order setting aside attachment not appealable.

An order setting aside and vacating an attachment is not reviewable in the court of appeals.

Decided March 2, 1880.

THIS was an appeal from order of general term affirming an order of special term, setting aside and vacating a warrant of attachment. The opinion of BARRETT, J., as well as the affidavits in the case are reported in 57 *Howard*, page 78.

A. Blumensteil, for defendants and respondents.

1. The order is not appealable, the motion to vacate the attachment was founded upon the insufficiency of the papers on which it was granted. The court at special term and general term decided that the attachment should be set aside. This is not a question of jurisdiction, and the order is not appealable (*Allen* agt. *Meyer*, 71 *N. Y.*, 1; *Wallace* agt. *Castle*, 68 *N. Y.*, 373; *Liddle* agt. *Paton*, 67 *N. Y.*, 393).

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Even if the affidavits had been sufficient to authorize the granting of an attachment, the exercise of that power is purely discretionary. The language of section 635 of the Code of Civil Procedure is that an attachment "may be granted," etc. It does not appear but that the general term considered the whole case, including the affidavit of Thomas D. Adams, interposed on the motion, and the answering affidavit of the defendant. The order of the special term recites the reading of all the affidavits (*See Godfrey agt. Godfrey*, 75 *N. Y.*, 434). It then became a mere matter of discretion whether, upon all the facts, the court was authorized to set aside the attachment, and the case comes clearly within the decision of *Allen agt. Meyer (supra)*.

Samuel Hand, for plaintiffs, respondent.

DANFORTH, *J.*—The appeal should be dismissed, the order appealed from not being one that is reviewable in this court (59 *N. Y.*, 313; 68 *id.*, 370; 71 *id.*, 594).

Appeal dismissed.

All concur.

SUPREME COURT.

THE FIRE DEPARTMENT OF WEST TROY agt. G. PARISH OGDEN
and EZRA R. VAIL.

Foreign insurance companies — agents of — penalty for not filing bond — Laws of 1879, chapter 153.

Where the defendants had issued several policies of insurance upon property located in West Troy, and had paid the two dollars upon the hundred on premiums received, but had not given the bond required by the statute (*Laws of 1876, chapter 359, which is amendatory of chapter 465 of Laws of 1875*), in an action to recover the penalty for not having given the bond as required by the statute :

Held, that, by the act of the legislature (*Laws of 1879, chapter 153*) which again amends the acts of 1875 and 1876, the right to such penal-

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ties, when the premium has been paid, is taken away, and the statute necessarily includes and covers the case of a suit already brought, as well as that of one to be brought.

Where a penalty has been imposed by law, the legislature has power to repeal it entirely, or to limit the cases in which it is recoverable, even though an action has been brought for its recovery.

Albany Circuit, May, 1879.

MOTION for a new trial on judge's minutes.

A. J. Colvin and T. McMannus, for plaintiff.

Smith, Fursman & Cowen, opposed.

WESTBROOK, J.—By chapter 359 of the Laws of 1876, which is amendatory of chapter 465 of the Laws of 1875, every agent of a fire insurance company, not incorporated under the laws of this state, must pay for the benefit of the fire department of the village or city in which any insurance shall be effected upon property located therein, except in the cities of New York and Albany, two dollars upon every hundred dollars premiums received for such insurance.

The act further requires a bond to be given by every agent, conditioned for a faithful annual account of premiums received. A penalty of \$200 is given for every policy issued by an agent who has not given the bond.

The defendants in the present action had issued several policies of insurance upon property located in West Troy, and had paid the two dollars upon the hundred on premiums received, but had not given the bond required by the statute. It was held upon the trial that the actual payment of the premiums did not bar the action (*Fire Department of Whitesboro agt. Thompson*, 16 Hun, 474).

A verdict in favor of the defendants was, however, ordered, because, by chapter 153 of Laws of 1879, which again amends the acts of 1875 and 1876 aforesaid, it is provided: "But no action shall be maintained, or recovery be had in any

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court of this state, for or on account of any such offense heretofore happening; nor shall any court have power or authority to render judgment for or on account of any such offense heretofore happening, when such agent shall have paid to the party entitled to the same the premium required to be paid by section one of this act, as amended by section one of chapter three hundred and fifty-nine of the Laws of eighteen hundred and seventy-nine."

A motion is now made for a new trial upon the judge's minutes, and it is claimed that as the penalties had been incurred when the present action was begun, the recent statute should be so construed as not to affect an action already commenced, and that as the right to the penalties had become vested, such right could not be taken away by the legislature.

It is conceded that statutes must have a prospective operation only, unless the intent that they shall have a retrospective effect also is manifested by clear words. Cases quite numerous can be found, and the learned counsel for the plaintiff have cited several, in which courts have given statutes a prospective operation. Each statute, however, must be construed by its own words. It is clear that the act of 1879 must operate retrospectively, for it declares that, when the premiums have been paid, though no bond has been given, that no court has "power or authority to render judgment for or on account of any such offense heretofore happening." This language is as sweeping and broad as can be made. It necessarily includes and covers the case of a suit already brought, as well as that of one to be brought, and in any and every case the court is deprived of jurisdiction to render judgment for any "offense heretofore happening" when the premium has been paid. No other construction of the words, as it seems to me, is possible. Actions pending are not exempted from the operation of the statute, and such cases must, therefore, be affected by the plain language used.

There was no such vested right in the plaintiff that the act

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must be held invalid for that reason. A penalty had been imposed by law, and the legislature has power to repeal it entirely, or to limit the cases in which it was recoverable, as it in fact has done, even though an action has been brought for its recovery (*Butler agt. Palmer*, 1 *Hill*, 324; *see opinion of judge Cowen on pages 329, 330, &c.*; *Smith agt. Banker*, 3 *Howard's Pr.*, 142; *Church agt. Rhodes*, 6 *Howard's Pr.* 281).

The motion for a new trial must be denied, with ten dollars costs.

SUPREME COURT.

LOUIS C. HAUSTEIN, as general guardian of LOUISA KULL, agt.
BARBARA KULL, JOHN P. HOLLER and HENRY WOLFF.

Pleading — demurrer to complaint — action by general guardian on an administratrix's bond — Parties — Presumptions.

An action may be maintained by a general guardian in his own name to recover a debt due to his ward.

Where the decree of a surrogate directed an administratrix to pay to the plaintiff, as general guardian of their infants, a certain sum "for each of said infants, as the distributive shares," of each of them:

Held, upon demurrer to the complaint, in an action brought by the general guardian of one of the infants for her separate share, that the other infants were not necessary parties to the suit, and that a separate suit might be brought for each share.

When a public officer performs a specific act in pursuance of a statute, it must be presumed to have been done for the purposes of the act, and in pleading it is sufficient to aver the performance of the act.

Thus, where a bond given by an administratrix, was ordered by the surrogate to be assigned to the general guardian, under the statute, the presumption is, that it was directed to be assigned for the purpose of being prosecuted.

Special Term, February, 1880.

DEMURRER to complaint.

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Peters & Lyon, for the demurrer.

Frank & Weiss, opposed.

VAN VORST, *J.*— The action is brought on an administratrix's bond, executed by the defendant Kull as principal, and the other defendants as sureties, to recover a sum of money decreed by the surrogate of New York, to be paid by the administratrix to the plaintiff as general guardian.

The first ground of demurrer taken is, that the plaintiff has no legal capacity to sue, he not being the real party in interest, and because he is the general guardian, and not the guardian, *ad litem*, of Louisa Kull, named in the title of the action.

The decree of the surrogate was, that the administratrix should pay to the plaintiff, as general guardian of the three infants named in the complaint, a sum of money for each infant. The decree not having been complied with, and the proper steps having been taken to authorize a suit on the bond, it is clear that the action can be maintained by the plaintiff, the person to whom, as general guardian, the money was ordered to be paid.

Thomas agt. *Bennett* (56 *Barb.*, 197) is a direct authority in support of an action by a general guardian, in his own name, to recover a debt due to his ward (*See, also, Segelken* agt. *Meyer*, 14 *Hun*, 593). This ground of demurrer is, therefore, not well taken.

Another ground of demurrer is, that there is a defect of parties plaintiff, through the omission of Sophia Kull and Lena Kull, in whose favor the decree is alleged to have been made in part, and for whose benefit distributive shares were directed by the decree to be paid to Louis C. Hauenstein, as their general guardian.

The decree directs the administratrix to pay to the plaintiff, as general guardian of Sophia Kull, Louisa Kull and Lena Kull, a certain sum "for each of said infants, next of kin, as the distributive share of each of said infants."

Had the direction been to pay to the general guardian for

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the infants jointly, and not separately, a sum of money, the point would be well taken, but, as it is, the objection is groundless. Where the interests of legatees, or distributees, have been ascertained and fixed, by some competent proceeding, and the aliquot share of each determined, separate suits may be maintained on the behalf of each for the recovery of his share (*The General Mutual Insurance Co. agt. Benson*, 5 *Duer*, 168; *Ponce agt. Hathaway*, 43 *Barb.*, 214; *Hitchcock agt. Linsley*, 17 *Hun*, 556).

Another ground of objection is, that the complaint does not allege that the bond of the administratrix was assigned by the surrogate to the general guardian "for the purpose of being prosecuted."

There are two modes prescribed by statute for the prosecution of an executor's or administrator's bond, one by order of the surrogate directing the prosecution immediately after making the decree and the refusal or omission to obey it. The other by filing a certificate or transcript of the decree, the issuing of an execution thereon, and the assignment of the bond on the return of the execution unsatisfied (*Laws of 1837, chap. 460, secs. 63, 64, 65; Laws of 1844, chap. 104, secs. 2, 4*).

The complaint shows clearly enough that all the steps preliminary to an assignment have been taken, and it also alleges the assignment.

The surrogate had power under the statute to assign for the purposes of prosecution only. When a public officer performs a specific act in pursuance of a statute, it must be presumed to have been done for the purposes of the act. There is no implication that it was done for any other purpose. And in pleading it is sufficient to aver the performance of the act. If the bond was assigned for any purpose other than that mentioned in the statute, the objection, not appearing upon the face of the complaint, must be taken by answer.

The demurrer must be overruled, with liberty to the defendants to answer on payment of cost.

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The objection that three separate actions may be brought, when one would be sufficient, cannot be considered here. The right to bring this action seems to me clear. If other suits are brought in behalf of the other distributees, and if it be proper to do so, the court will consolidate them. But it is not necessary to pass upon that question absolutely at this time.

SUPREME COURT.

PRISCILLA ALLEN agt. GEORGE W. ALLEN.

Alimony and counsel fees allowed to wife in action against husband to annul marriage on ground of impotency.

Alimony and counsel fee will be granted to the wife in an action against her husband for divorce to annul the marriage on the ground of his physical incapacity.

The case of *Bartlett* agt. *Bartlett* (*Clark's Ohy. Reps.*, p. 460) not followed.

At Chambers, February, 1880.

MOTION by plaintiff for alimony pending the action, and for a counsel fee to prosecute the same.

The action was brought by Priscilla Allen against her husband, George W. Allen, for a divorce annulling the marriage contract upon the ground that he was physically incapable of entering into the marriage state.

The complaint alleged the marriage of the parties at the city of New York, on the 15th day of May, 1879, and residence in this state. It then alleged the defendant's physical incapacity of entering into the marriage state, and gave the facts thereof, which were known to him and unknown to her, and were intentionally and fraudulently concealed from her.

The complaint then demanded judgment that the said marriage be annulled and declared void.

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The answer admitted the marriage and residence, and denied each and every other allegation.

The affidavit of the plaintiff, upon which the motion was made, stated that she is the wife of the defendant, and that she commenced the action to obtain a divorce from her marriage upon the ground of her husband's physical incapacity of entering into the marriage state, and for his fraud upon her in this respect; that she has lived and resided with said defendant, as his wife, for about three months at the residence of said defendant, at Hastings-on-the-Hudson; that she was obliged to submit to his ineffectual embraces until August 1, 1879, when she was compelled to leave him; that defendant had been brutal to her, injuring and hurting her body; he was gruff and unkind in his manner, all proceeding from his physical incapacity and anger, chagrin and suffering because he could not consummate the marriage with her. She then narrated several facts in proof of the above.

She further alleged that during the whole of their married life, he had only given her twenty-two dollars; never had bought her any clothing; never even paid her railroad fare, she was obliged to live on her own means, which were nearly gone; that she was in great need to pay the expenses of this suit and to prosecute the same; she had not hitherto made application for counsel fee, or alimony, because she thought she could finish the case with the little money she had, and as a matter of pride, but now she is compelled to do so, or else give up the suit and remain in her terrible situation.

The affidavit then alleged facts showing the means of the defendant to pay \$250 counsel fee and seven dollars per week alimony. The affidavit further alleged, that the defendant claimed he would win the suit and that thus, the defendant showed, she would remain his wife, and he would have to support her, whether she lived with him or not, as she could not live with him in consequence of his brutality.

The affidavit of George F. Langbein stated that the defendant and his counsel were defending the action very closely,

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and that expert medical witnesses would have to be called, which would be very expensive. It showed the proceedings in the cause thus far, and that the hon. Nathaniel Jarvis, Jr., had refused to dismiss the complaint, upon defendant's motion, when the plaintiff rested her testimony. It also appeared that there was a stenographer in the case and that a great deal of testimony had been taken at great expense.

That the defendant had opened his case and examined three physicians who had testified that the defendant was a perfect man.

The affidavit of the defendant admitted he was plaintiff's husband; he denied his physical incapacity, and any fraud upon the plaintiff; that he had been examined by three eminent and experienced physicians who pronounced him a perfect man and had so testified before the referee. That he had not paid his counsel anything, and whatever sum he was paid was advanced by a relative, not his father or mother; that he was a poor man and had no means, and no property of any value, earned his living by laboring in a quarry, in which he had no interest, and had given the plaintiff all his earnings.

"Deponent says that he has had sexual intercourse with plaintiff, and that she often refused to permit him to have intercourse with her; that he has said he would win this cause, and that it would be unjust to him to be compelled to furnish means to this plaintiff to fight him.

E. T. Lovatt, defendant's attorney, made an affidavit that from the evidence already in the case, it would be impossible for plaintiff to succeed, and otherwise corroborated defendant's affidavit.

E. T. Lovatt, for defendant, in opposition to the motion, insisted that the court cannot order an allowance for costs or alimony, in the wife's suit to declare a marriage null by reason of the husband's physical incapacity, and cited *Bartlett* agt. *Bartlett* (*Clarke*, 460).

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George F. Langbein, for plaintiff, in support of the motion, argued, that he anticipated the point made ; that it was an erroneous idea. Vice-chancellor WHITTELSEY once so decided, in a case where all his sympathies from the facts, were against the application. The decision has never been followed. Its reasoning was overthrown by chancellor WALWORTH in 1845, in a case where alimony and counsel fee were given the wife in an action for divorce on the ground of the nullity and illegality of the marriage. An examination of the law will show that the decision in *Bartlett* agt. *Bartlett* should not be followed.

Chapter 8 of the Revised Statutes (*Banks, 6th ed., p. 147*) treats of the domestic relations, and has four titles, the first is title 1, " of husband and wife." This title has seven articles, as follows :

Article 1. Of marriage and the solemnization and proof thereof.

Article 2. Of divorces, on the ground of the nullity of the marriage contract.

Article 3. Of divorces, dissolving the marriage contract.

Article 4. Of separations or limited divorces.

Article 5. General provisions applicable to the last two sections (*see p. 147*). It does not say "articles." (The two other articles of this chapter and title are not in point.)

Article 2, under which our cause of action comes, runs from section 35 to 50. It commences :

" Sec. 33. The supreme court may, by a sentence of nullity, declare void the marriage contract for either of the following causes existing at the time of the marriage : "

There are five subdivisions, the second is as follows :

" 2. That the former husband or wife of one of the parties was living, and that the marriage with such former husband or wife was then in force."

It will be seen that under this subdivision alimony and counsel fee have been repeatedly given.

Sub. 3 is : " That one of the parties was an idiot or lunatic."

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Sub. 4. That the consent of one of the parties was obtained by force or fraud.

Sub. 5. That one of the parties was physically incapable of entering into the married state.

Section 48 of this article reads as follows: "Suits to annul a marriage shall be by bill and shall be conducted in the same manner as other suits prosecuted in the courts of equity, and the court shall have the same power to award issues, to decree costs, and to enforce its decrees, as in other cases."

The last section of article fourth is section 70. Article fifth is headed "general provisions," &c., and commences with section 71, and reads as follows: "If a married woman at the time of exhibiting a bill against her husband under the provisions of the two last articles shall reside in this state, she shall be deemed an inhabitant thereof, although her husband may reside elsewhere."

It will be seen that this section expressly mentions, "under the provisions of the last two articles" and sections 72, 73 and 74, the rest of the articles of this section say nothing about it and clearly, and of necessity, must refer to all the foregoing articles about "divorces." The next section, 72, shows this, in connection with the former titles, and provisions of the former articles, it is as follows: "In every suit brought either for a divorce or for a separation the court may in its discretion require the husband to pay any sums necessary to enable the wife to carry on the suit during its pendency, and it may decree costs against either party, and award execution for the same or it may direct such costs to be paid out of any property sequestered or in the power of the court, or in the hands of the receiver."

Now the heading of article second under which this action is brought, is, of divorces on the ground of the nullity of the marriage contract. Thus it is seen that this action is an action for divorce, and comes right within section 72 of article fifth.

Section 73 does not repeat the language of section 71 to wit, : "under the provisions of the last two articles."

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Sections 73 and 74, also contain many provisions for carrying out the practical provisions of article second. These two sections do not repeat the language of section 71.

If the provisions of article fifth did not apply to the preceding four articles, the court, strickly speaking, would often be powerless to carry out those provisions. Again, if sections 72, 73 and 74 of article 5 applies only to articles 3 and 4 where are the "general provisions" applicable to articles 1 and 2.

Besides, the glaring injustice of such a construction is so apparent, and such a construction is so much against all common sense and reason, that it is impossible that the revisers, in the days when a man married a lady he also married and took all her property, meant or intended any such thing.

Thus a lady would be *de facto* and *de jure* married (because she would be called a wife until a court of competent authority declared otherwise), the husband would have all her property and she would be penniless, and entirely unable to commence or prosecute such a difficult and expensive suit as a divorce on the ground of nullity, because of physical incapacity. She would be completely in the power of the husband and the law, and without any remedy.

The revisers never meant or intended that; they do not say so in section 72 of article 5, and it is not the true construction of the law.

There is only one case where a construction was erroneously made differently; that was the case of *Bartlett agt. Bartlett* (*Clarke's Chy. Reps.*, p. 460), decided February, 1841, by FREDERICK WHITTELSEY, vice chancellor. Only one volume was ever issued, and this volume is of reports of chancery cases in the eighth circuit of this state. In 1871 N. C. Moak, Esq., arranged a "new edition, with notes, and references to subsequent cases and authorities."

Although nearly all other cases in this volume have notes and reference to subsequent cases and authorities, this case has none. It contains no points, arguments or cases cited by

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counsel, which it was usual to do, and report in those days, and, certainly vice-chancellor WHITTELSY is no authority to follow.

The facts in the case were, and the head-notes so show, that the wife went from the house of her husband to that of her father, and the father agreed with the husband, if he would make no claim for the value of his wife's services he, the father, would make no claim upon the husband for her support, and that she would not involve her husband in debt by any acts of her own. The vice-chancellor held the affidavits conclusive in favor of the husband. He held, that as the father was supporting the wife under this agreement, there was no necessity for calling upon the husband to contribute to this object, as the matter had been arranged between the father and the husband. He then goes on to say that in all cases he has examined, where alimony or counsel fees were given, were for divorces on the ground of adultery, or for a separation. He then says: "It will be remembered that the case before us is different. The object of the bill here is not for a divorce, or separation, but for a decree of nullity of the marriage on account of the impotency of the husband. Now the vice-chancellor fell into a great error here, as we have shown that every action to annul a marriage contract is for a divorce. Article second shows it, whereas the vice-chancellor thought only actions on the ground of adultery or for a separation were actions for divorce, and, therefore, actions "of divorce, on the ground of the nullity of the marriage contract," were not actions for divorce, and no alimony or counsel fees could be given. The statute expressly says they are actions for divorce; in his opinion he says they are not, and upon this error and false and erroneous reasoning he made the decision he did, which has never been followed in any case. Again he says: "The bill in this case is filed neither for a divorce or separation under articles 3 or 4, but for annulling the marriage contract under article 2." We see how erroneous this opinion is; the bill

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was filed for a divorce to annul the marriage contract under article 2, to which all the sections of article 5 apply, except the first section which it expressly says is only applicable to articles 3 and 4 and not to article 2. All the way through his opinion he seems to think a suit to annul the marriage is not an action for divorce, but something separate and distinct by itself. Then he says that the legislature has given no express direction to the contrary, but that at least it is implied, that is, that he implies it, because he thinks such an action is not an action for a divorce, but solely to annul a marriage contract. He then goes on to reason about the matter. That in actions for cruelty or adultery the wife could not remain with her husband without danger to her personal security or violation of her purity of principle, *ergo*, in an action for impotency she could! And as he has all the property of the wife, unless he was made to contribute, the wife would be remediless under the most grievous wrong. (In an action for impotency, therefore, she would not!) He says: "This case is entirely different, and proceeds upon the ground that there never was any marriage in law, and asks the court to declare it null." The vice-chancellor is in great error there. The action does proceed upon the ground that there was a marriage, this is the very first paragraph in the complaint, and it proceeds upon the ground that it was legal, but asks the court to divorce it, to set it aside, to annul it, on the ground of the impotence and physical incapacity.

The rest of his remarks are hardly worth answering. He sees no reason why the woman cannot live safely with the man she has wedded. The impotency was the man's misfortune, not his fault. (In our case it was his fault, the effects of masturbation.) No error of temper or conduct in him; the wife could get some friend to aid her to procure the contract to be declared null. He can find no reason "at least in this stage of the suit, and no sympathy to stretch a doubtful authority, if there were any." In this language he ends this remarkable opinion. Now, in our case, there is every sympathy to stretch

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a doubtful authority as Mr. Jarvis, the referee, can tell the court, and as the evidence shows.

The case of *North* agt. *North* (1 *Barb. Chy.*, p. 241), decided by chancellor WALWORTH in 1845, after this case of *Bartlett* agt. *Bartlett*, disposes entirely of the erroneous reasoning of vice-chancellor WHITTELSY, and shows by authority, and decides that in an action under article 2 to annul a marriage contract, alimony and counsel fee can and is given by the court to the wife.

The chancellor says, at page 243, that where the marriage is admitted (as in our case) the presumption is that it was legal, until the contrary shall have been established by the proofs in the case. He says it is a mistake to suppose that the allowance for *ad interim* alimony, and for the expenses of the suit, is confined to cases in which both parties admit the original marriage to have been legal; that the practice is otherwise where the marriage is admitted as a fact, or is admitted that they were in fact married, but which marriage is alleged to have been illegal and void. In such a case she is entitled to alimony and counsel fees until the facts upon which the supposed illegality or invalidity of the marriage depends are decided to be true or false by the proofs.

Chancellor WALWORTH says, at page 244, that "by referring to the reviser's notes it will be seen that the allowance does not depend wholly upon the statute, but upon the practice of the court, as it previously existed" (*and see Brinkley* agt. *Brinkley*, 50 *N. Y.*, 184), wherein the court of appeals decided that the supreme court had inherent power to grant allowance for wife's support pending the suit. He then continues: "And even subsequently to that statute, this court has continued to allow *ad interim* alimony in matrimonial cases, in the same manner as before. *Ayliffe* says, a husband, regularly speaking, is bound to allow his wife alimony pending the suit, whatever the cause may be. *Poynter* also lays down the rule generally, that in all suits of divorce, or suits for the restitution of conjugal rights, or in suits of nullity, if the

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nullity be promoted by the husband as soon as the court is judicially informed that a fact of marriage has taken place, it is competent for the wife to apply for alimony pending the suit (*See, also, 1 Ought Ordo Judic*, 306, tit. 206).” The learned chancellor then cites some cases where the wife received alimony and counsel fee in actions to annul the marriage contract, none of which it seems vice-chancellor WHITTELSEY could find.

As the supreme court, both before and since the Revised Statutes, makes equitable provisions, and in so doing has been guided by the decision of the ecclesiastical courts of England in similar cases (*Mix agt. Mix*, 1 *John. Ch.*, 110; *Denton agt. Denton*, 1 *John. Ch.*, 364; *Lewis agt. Lewis*, 3 *John. Ch.*, 519; *Wood agt. Wood*, 2 *Paige*, 114; *North agt. North*, 1 *Barb. Ch.*, 244), it is important to see what those decisions are.

Sir. ROBERT PHILLIMORE, in *Reynolds agt. Reynolds* (*Laro J. Reps.* [N. S.,] vol. 45, p. 89), says: “A marriage sought to be set aside on the ground of impotence is not void, but voidable.”

In *M. agt. C.* (41 *Laro J.* [N. S.,] p. 40), lord PENZANCE made the wife pay to her husband the costs of her unsuccessful suit out of her separate income. It was a case of physical incapacity, and she failed to sustain the charges.

The rule is thus stated in *Shelford*: “After proof of a marriage in fact, alimony, pending the suit, will be allotted, whether it be commenced by or against the husband not only in cases of impotency, but in all cases of nullity of the marriage and in suits of restitution of conjugal rights, or for divorce by reason of adultery or cruelty” (*Shelford's Practical Treatise on Marriage and Divorce*, Law Library [New Series], vol. 17, p. 347 [587], citing *Bain agt. Bain*, 2 *Addams*, 253; *Smyth agt. Smyth*, 2 *Addams* p. 254; *Wilson agt. Wilson*, 2 *Hagg. Cons. R.*, 204; *Bird agt. Bird*, 1 *Lee*, 209).

Shelford (above) is cited in full and approved by the court in the case of *Frith agt. Frith* (18 *Geo. Reps.*, at p. 275),

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where, after extracting the above statement, the court says: "And this statement of the rule seems to be well supported by decided cases, I refer particularly to *Portsmouth* agt. *Portsmouth* (3 *Ad.*, 63) and *Bird* agt. *Bird* (1 *Lee*, 209). According to this last case this court, in *Roseberry* agt. *Roseberry*, went too far in permitting the husband to object to the payment of the alimony that the marriage, though a marriage *de facto* was not one *de jure*."

Roseberry agt. *Roseberry* (17 *Geo. Reps.*, p. 139) was a suit by the wife to annul the marriage. She made application for alimony, the husband answered, that though married in fact the marriage was void in law; alimony was allowed. The general term reversed; the same court in *Frith* agt. *Frith* reversed this decision, thus holding that the wife could have alimony in her suit to annul the marriage. In *Bird* agt. *Bird* (*Lee's Ecc. Reps.*, vol. 1, at pages 210, 211), Dr. Hay, one of the counsel for the wife says: "It is sufficient for us to show a marriage *de facto*; if a woman brings a suit for impotency against her husband, she is to have alimony, and costs during the suit," and that is a much stronger case than this, for there the woman who prays the alimony and costs, affirms the marriage was null *ab initio*, whereas in this case the man affirms and the wife denies it (according to this there is such a rule in the English court, unless Dr. Hays has made a deliberate misstatement).

Dr. Pinfold, the opposing counsel, admitted that "to entitle to alimony and costs there must be a marriage proved and confessed." Sir GEORGE LEE, the judge said: "The man, by his suit, admitted that he was married to her *de facto*, and it was alleged, and not denied, that he had lived with her, as his wife, for many years," so in the wife's suit she admits the marriage and living with her husband.

Phillimore adds, in a note to this case, at page 211, "I apprehend that this decision, which seems to have been in a case *prima impressionis*, has descended to our times with the authority to which it is justly entitled. In all matrimonial

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causes where a fact of marriage is established and the parties have not separate incomes, the husband is liable, during the progress of the cause, to pay for the maintenance of his wife and the costs of the suit. But, in case of gross fraud, it would, I presume, be competent for the judge to condemn the asserted wife, in costs, at the termination of the suit.

In England there is what is called a "divorce act." By section 53 of this act the ecclesiastical courts and divorce courts are expressly authorized "to make rules and regulations concerning the practice and procedure under this act." Under that section Rule 159 has been made.

In *Jones* agt. *Jones* (before the full court, lords PENZANCE, MILLER and BRETT), reported in volume 41, Law Journal, page 53, at page 55, the judges say: "The fifty-third section authorizes the court to make rules and regulations concerning practice and procedure. But the right of the wife's solicitor to the costs of the hearing is not a matter of practice but one of principle. The effect of holding that the wife's costs are in the discretion of the court will be to prevent her if she has no separate estate from bringing her case to a hearing. No proctor or solicitor would incur the responsibility of prosecuting or defending a suit for a wife, if he is liable without fault on his part to lose his costs. He must take his instructions from the wife, and until the hearing he cannot know whether her statement is correct." Lord PENZANCE also writes an opinion explaining these rules ending, "the appeal, therefore, will be dismissed, the wife have her costs as to the question of alimony but not of the appeal itself."

Browning on Marriage and Divorce, as administered in the court for divorce and matrimonial causes, &c., London, dedicated to lord PENZANCE, contains the rules and regulations for her majesty's court for divorce and matrimonial cause (p. 299) made under the various statutes of Victoria. Rule 81 is as follows: "The wife being a petitioner in a cause may file her petition for alimony pending suit at any time after the citation has been duly served upon her husband, or after order

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by the judge ordinary to dispense with such service, provided the *factum* of marriage between the parties is established by affidavit previously filed." At page 228 of this book, in a note, is found the conclusive answer that the wife can have alimony in a suit for impotency. By section 32 of the divorce act upon any petition for dissolution of marriage the court has the same power to make *ad interim* orders for payment of money, by way of alimony or otherwise to the wife, as it would in a suit instituted by judicial separation; that she has not answered a charge of adultery does not affect her right to alimony for she is presumed to be innocent until proved guilty. So, also, in a suit of nullity, for there is at least a *de facto* marriage and until it is pronounced void she is presumed to be a wife (*Bird alias Bell* agt. *Bird*, 1 *Lee*, 209; *Miles* agt. *Chilton*, 1 *Roberts*, 684).

This court is vested, by implication, if it has not the express power, with those equitable and incidental powers necessary to grant the plaintiff equitable relief by giving her alimony and counsel fees.

The court of chancery had, and the supreme court has, general power to adjust remedies, and annex conditions to the exercise of rights, and the redress of injuries (*Story's Eq. Jur.*, secs. 27, 28).

In *Griffin* agt. *Griffin* (47 *N. Y.*, 135) alimony and counsel fees were granted to the wife of an extraordinary nature. The court said, page 136, "It is conceded that there is no statute, in terms, authorizing the order, and that, if sustained, it must rest upon the incidental powers formerly vested in the court of chancery, in cases of this description, and to which the supreme court has succeeded." Page 137: "It has been the constant practice of the court of chancery, both before and since the Revised Statutes, to make equitable provision for all these matters, and in so doing it has been guided by the decisions of the ecclesiastical court of England in similar cases."

This was upon the ground of the general equitable juris-

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diction of the court, and also that when our statutes did not confer jurisdiction upon the court of chancery in these actions for divorce, which by the English law are solely cognizable in the ecclesiastical courts, the grant of the jurisdiction carried with it by implication, the incidental powers which were indispensable to its proper exercise, and not in conflict with our statutory regulations on the same subject (*Perry agt. Perry*, 2 *Paige*, 504, 506; *Devenbagh agt. Devenbagh*, 5 *Paige*, 556; *Griffin agt. Griffin*, 47 *N. Y.*, at page 137).

In this state the power of the court is not alone confined to the statute as in the states of Vermont, Rhode Island, Massachusetts and North Carolina. Jurisdiction in cases of divorce was conferred here, not as a special and limited jurisdiction, granted to a common-law court, but it was granted to a chancery court, and the court in administering it has always called to its aid its own equity powers and the decisions of the ecclesiastical courts of England in like cases (*Griffin agt. Griffin*, in 47 *N. Y.*, at pages 137, 138).

The court has already seen what the decisions of the ecclesiastical courts of England, in like cases, are, that they have always granted alimony in all matrimonial cases. We have only to add an American author, *Bishop on Marriage and Divorce* (vol. 2, sec. 402), where he says, "The allowance cannot be made until a fact of marriage has either been admitted or proved. But the marriage need not be valid, for though void in law, if it has operated practically upon their property rights, like a valid marriage, the same reason exists for making the temporary provision." At page 403 he continues to say, "Even where the wife declares that the marriage was void, on principle, though undoubtedly she must be bound by her allegation, we saw in the last section that, even when the marriage is void, she should still have temporary alimony. *A fortiori*, when it is voidable, as for impotence, her allegation shows precisely the same foundation for alimony as if it were originally without defect, namely, that all her property has not only

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practically but lawfully vested in the husband, and that he has become entitled to receive her earnings while he has received them in fact." Upon this page is a note. Mr. *Bishop* speaks of the decision in *Bartlett* agt. *Bartlett*; he says: "The decision appears to have been based chiefly upon the statute, yet even in this view, there is certainly room to question its harmony with principles elsewhere established."

The plaintiff and the defendant are still husband and wife; they call each other so; the whole world calls them so; the law looks upon them as such; she had to submit to his impotent embraces as his wife, is she not entitled to receive support pending her action to dissolve or sever such an unnatural alliance into which she was deceived by the defendant?

The pleadings admit the marriage, and in this case the wife comes into court and admits the marriage; she, however, wishes to make it void to get rid of an admitted marriage; to annul it, upon grounds she only discovered, and could only discover after the marriage.

DONOHUE, J. granted the motion and referred it to hon. Nathaniel Jarvis, Jr. (the referee already in the case, to try and determine the issues), to fix the amount.

An order was thereupon entered on the 21st day of January, 1880, referring it to Mr. Jarvis "to fix the amounts of such alimony and counsel fee, and that he report the amounts so fixed by him to this court forthwith."

On the 5th day of February, 1880, the referee reported and fixed the sum of \$250 counsel fee, and five dollars per week alimony, which report was confirmed by the court.

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N. Y. COMMON PLEAS.

HATTIE A. H. BLOODGOOD agt. MORRIS S. BLOODGOOD.

Alimony and counsel fees — wife not entitled to, in action against husband to annul marriage for impotency; — Stipulation to pay referee's fees will be enforced.

In an action brought by a wife to have the marriage annulled for the alleged impotency of the husband, the court is not authorized to make an order against the husband for alimony to the wife, *pendente lite*, or to provide funds to defray the expenses of the suit. This is adverse to *Allen* agt. *Allen*, ante, p. 27.

The provisions of the Revised Statutes as to requiring the husband to pay sums necessary to carry on the suit during its pendency, are restricted to cases where the wife admits the existence of a valid marriage and seeks a divorce or separation for subsequent misconduct of the husband.

Where the husband is plaintiff and seeks to annul the marriage, but the wife affirms its validity, she is entitled to alimony and counsel fees.

Where the husband has stipulated to pay half the referee's fees, such stipulation will be enforced.

Special Term, May, 1880.

ACTION by wife to have marriage annulled for alleged impotency of husband.

Application for alimony and counsel fee.

George B. Ely, for plaintiff.

John E. Hartley, for defendant.

J. F. DALY, J. — I find in the opinion of the court of appeals in *Griffin* agt. *Griffin* (47 N. Y., 134), delivered by RAPALLO, J., the very decided expression of opinion that the provisions of the Revised Statutes as to requiring the husband to pay sums necessary to carry on the suit during its pendency are "very properly restricted to cases where the wife admits

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the existence of a valid marriage, and seeks a divorce or separation for subsequent misconduct of the husband. Where she denies the existence of the marriage she cannot consistently claim that the defendant is under any obligation to provide her with means to carry on her suit against him (*Bartlett* agt. *Bartlett*, *Clarke's Ch. R.*, 460; *North* agt. *North*, 1 *Barb. Ch.*, 243)."

The case of *Bartlett* agt. *Bartlett*, cited with approval by the court, is directly in point and is authority for denying alimony to the wife in her action to set aside the marriage for the husband's alleged impotency. Where the husband is plaintiff and seeks to annul the marriage but the wife affirms its validity she is entitled to alimony and counsel fees (*North* agt. *North*, cited above). This latter case distinguishes actions by the wife and against the wife to set aside the contract.

Whatever reason there may be for questioning the soundness of the views presented in these cases, it is idle to enter upon such a discussion in the face of the authority cited.

I understand that the supreme court at special term, in the case of *Allen* agt. *Allen*, February, 1880, has allowed alimony and counsel fees in an action by the wife against the husband to annul a marriage for his impotency. But this is clearly against the cases in this state and I cannot follow the decision. The brief of plaintiff's counsel in that case shows the English practice to be in favor of the allowance. Our practice is different.

So far as alimony and counsel fees are demanded in this motion it must be denied; but the defendant's stipulation to pay half the referee's fees may be enforced as it rests upon his own engagement. The motion to compel him to pay his share will be enforced (*Fischer* agt. *Raab*, 56 *How.*, 218-223) when proof is made of the amount due.

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SUPREME COURT.

AMELIA KERR, executrix, and WALTER CARTER, executor,
&c., agt. EDWARD H. DOUGHERTY and others.

Will — construction of—Legacies — how far section 6 of the act of 1848 is applicable to bequests to corporations.

The second clause of the will provided : “ II. I give and bequeath unto E. H. D., son of W. C. D., deceased, the sum of ten thousand dollars in trust, for the sole use and benefit of his two daughters ” (naming them), “ to be given to them at such times and in such sums as he shall think proper, share and share alike. If either of them die before receiving their share, then the balance is to be given to the survivor: ”

Held, that there is no such ambiguity or uncertainty as makes it impossible to ascertain the intention of the testator, nor is the trust void as being contrary to the provision of the statute. There is no suspension of the power of alienation beyond two lives in being under any circumstances. The trust terminates as to one-half of the legacy upon the death of the first of the beneficiaries, and as to the balance, it terminates upon the death of the survivor. Under no circumstances could the trustee hold any portion of the legacy after the death of the survivor.

The fifth clause of the will is as follows: “ V. I give and bequeath unto the directors of the Union Theological Seminary of the city of New York, the sum of ten thousand dollars, to be invested as a permanent fund in stocks or bonds of the United States or of the state of New York, the interest of which shall be given as support to such student or students of said seminary studying with a view to the Christian ministry as shall be selected for the gift by the directors :

Held, that the objection that the legacy being given as support to the students of the seminary, which is not one of the specified purposes of the incorporation of the seminary, cannot be maintained, because, if the object of the corporation is the instruction in theology, &c., the support of such students would seem to be included in the general scope of the purposes of an institution of that description.

Held, also, that the objection that this legacy is void, because no purposes, whatever, have been enumerated in the act establishing this corporation, and no object to be attained by the creation of the same is set forth in its charter, is untenable, the “ title ” of the act of incorporation sufficiently indicates the purposes and object to be attained by the creation of the same. The act incorporates the Union Theological Seminary. The purposes of the institution are distinctly set forth in the title of the

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act of incorporation, giving to the words "Theological Seminary" the meaning ordinarily applied thereto.

The seventh clause of the will is as follows : " VII. I give and bequeath unto the Presbyterian Board of Home Missions the sum of five thousand dollars : "

Held, that, a corporation which is the successor and representative of another corporation cannot enforce the payment of a legacy which the original corporation had no power to receive. The legacy is, therefore, void, for the reason that the devise or bequest was not executed at least two months before the death of the testator, as provided by the act of 1862 incorporating the Presbyterian Committee of Home Missions of which corporation the Presbyterian Board of Home Missions is the successor.

The eighth clause of the will is as follows : " VIII. I give and bequeath unto the New York Bible Society the sum of one thousand dollars : "

Held, that, as this corporation was formed under the general act of 1848, this bequest cannot be sustained, the will of the testator having been made less than two months prior to his death. The act of 1860 does not affect or restrict the operation of the two months' clause of section 6 of the act of 1848.

The tenth clause of the will is as follows : " X. I give and bequeath unto the Trustees of the General Assembly of the Presbyterian Church of the United States of America, for the use of the fund of Disabled Ministers, the sum of five thousand dollars : "

Held, that a bequest, such as is now under consideration, is, if made by a citizen of Pennsylvania, beyond all question void.

Held, further, that it appearing that this bequest being in contravention of the act of the general assembly of Pennsylvania, passed in 1855, is void in Pennsylvania, the domicile of the legatee, it is consequently void in New York, the domicile of the testator.

If the law of the testator's domicile in terms forbid bequests for any particular purpose, or in any other way limits the capacity of the testator in the disposal of his property by will, a gift in contravention of the law of the testator's domicile would be void *everywhere*.

The legacy contained in the twelfth article of the will, of \$1,000 to the Sabbath schools of the Scotch Presbyterian Church, cannot be supported. There is no beneficiary named who has the power to take. It would be a great stretch of construction to put in the name of the Scotch Presbyterian Church as beneficiary, limiting the use of that legacy to the Sabbath schools.

Where, as in this case, the right of corporations to take by devise or bequest is restricted by the law of their incorporation, and is thereby made subject either to all the provisions of law relating to devises and bequests, or subject to the general laws of the state:

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Held, that the legacies to the Union Theological Seminary, the Presbyterian Board of Home Missions, the New York City Mission and Tract Society and the Presbyterian Hospital are void by reason of the provisions of section 6 of the act of 1848, the will of the testator having been made less than two months prior to his death.

As the limitation in section 6 of the act of 1848 still exists, not having been affected or restricted by the statute of 1860, where the privileges of a corporation are made expressly subject to any and all provisions of law (as was the case in respect to the above corporations), they cannot be exempted from the operation of this provision.

The direction that "the legacies are to be paid as soon as the amounts can be collected out of funds now invested on bond and mortgage at the city of Grand Rapids, Michigan," requires that both the principal and interest of the property, as fast as received, should form the fund out of which the legacies should be paid.

There is no valid objection to the validity of the bequest to the widow during her life of the net income of the estate after the payment of the legacies. The testator intended to give to his widow the income of all the estate after the payment of the legacies, and the executors named in the will are the trustees under the will to hold the estate during the life-time of the widow and collect the income therefrom, and pay the same to her during her life. This evident intention of the testator cannot be defeated because of the failure of certain of the legacies to vest. There is no rule of construction which imposes such a penalty because a will contains an invalid legacy.

The eighteenth clause of the will is as follows: "XVIII. I give and bequeath all the principal left of my estate after the death of my wife, Amelia Kerr, to the societies, seminary or institutions named in the fifth, sixth, seventh, ninth and tenth articles or bequests, to be divided according to the several amounts so bequeathed *pro rata*:"

Held, that, the above bequests are subject to the act of 1860, and are valid only to the extent of one-half of the estate of the testator, the valid legacies previously given being included in that one-half.

Held, also, that the residuum is not given to these corporations as a class, but that the proportion of each is distinctly specified in the will, and that, if any of the bequests are void, as to such bequests, the testator has died intestate and they must be distributed under the statute of distribution.

Held, further, that the bequests in the fifth article of the will to the Union Theological Seminary, and in the seventh article thereof to the Presbyterian Board of Home Missions, and in the eighth article thereof to the New York City Bible Society, and in the ninth article thereof, to the New York City Mission and Tract Society, and in the tenth article thereof to the Trustees of the General Assembly of the Presbyterian

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Church, &c., and in the twelfth article of the will to the Sabbath School of the Scotch Presbyterian Church, and in the thirteenth article of the will to the Presbyterian Hospital, are void and that the testator has died intestate as to the sums mentioned in said void bequests, and the same must be distributed to his widow and next of kin, according to the statute of distribution.

Special Term, May, 1878.

ON the 31st day of December, 1876, Henry A. Kerr, of the city of New York, died, leaving him surviving his widow, the plaintiff, Amelia Kerr, and his half-sister, the defendant, Almira E. Holahan, as his only heirs at law and next of kin.

On the 8th of December, 1876, the said Henry A. Kerr duly made and executed his last will and testament, as follows:

"I, Henry A. Kerr, considering the uncertainty of this mortal life, and being of sound mind and memory, do hereby make, publish and declare this instrument to be my last will and testament.

"I. My will is that all my just debts and personal expenses shall be paid out of my estate by my executors herein named as soon as practicable after my decease. The legacies are to be paid as soon as the amounts can be collected out of funds now invested on bond and mortgage at the city of Grand Rapids, Michigan.

"II. I give and bequeath unto Edward H. Dougherty, son of William C. Dougherty, deceased, the sum of ten thousand dollars in trust, for the sole use and benefit of his two daughters, Amelia Kerr and Edda H. Dougherty, to be given to them at such times and in such sums as he shall think proper, share and share alike. If either of them die before receiving her share, then the balance is to be given to the survivor.

"III. I give and bequeath unto Mrs. Almira E. Holahan one thousand dollars, which sum is to be credited to her on the book now kept by me of the house 'No. 146 West Fourth street, and deducted from the amount there charged.'

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"IV. I give and bequeath unto Maria Dunkin, the daughter of Thomas J. and Elizabeth Dunkin, one thousand dollars.

"V. I give and bequeath to the directors of the Union Theological Seminary of the City of New York, the sum of ten thousand dollars, to be invested as a permanent fund in stocks or bonds of the United states, or of the state of New York, the interest of which shall be given as support to such student or students of the said seminary studying with a view to the Christian ministry as shall be selected for the gift by the directors.

"VI. I give and bequeath unto the Presbyterian Board of Foreign Missions the sum of five thousand dollars.

"VII. I give and bequeath unto the Presbyterian Board of Home Missions the sum of five thousand dollars.

"VIII. I give and bequeath unto the New York City Bible Society the sum of one thousand dollars.

"IX. I give and bequeath unto the New York City Mission and Tract Society the sum of one thousand dollars.

"X. I give and bequeath unto the Trustees of the General Assembly of the Presbyterian Church of the United States of America, for the use of the fund of disabled ministers, the sum of five thousand dollars.

"XI. I give and bequeath unto the Board of Trustees of the Scotch Presbyterian Church, of which I am a member, the sum of one thousand dollars for church purposes.

"XII. I give and bequeath unto the Sabbath schools of the above named church the sum of one thousand dollars, to be divided as the pastor shall direct.

"XIII. I give and bequeath unto the Presbyterian Hospital the sum of one thousand dollars, for which aid and care is to be given to any of the members of the Scotch Presbyterian Church who may require aid in sickness.

"XIV. I give and bequeath unto my pastor, the Rev. Samuel M. Hamilton, the sum of one thousand dollars. •

"XV. I give and bequeath unto my beloved wife Amelia Kerr, all the net income that may be derived from my estate

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after my decease, and after the legacies are paid off she is to receive the same during her lifetime.

“Also, I give her all the furniture, useful and ornamental, in the building No. 10 East Ninth street, also in the building No. 146 West Fourth street, which I now own; also all my personal jewelry and clothing which I now own or may own at the time of my death.

“XVI. I hereby appoint Amelia Kerr, my wife, and Walter Carter, present elder in the Scotch Presbyterian Church, as my executrix and executor. I hereby give them full power and authority to grant, alien, sell and convey any and all lands and leasehold estates owned by me, or to which I shall be entitled, or in which I shall have any interest at the time of my death, and to execute, acknowledge and deliver good and sufficient conveyances thereof, and apply the proceeds of such sales in conformity to the provisions of this my last will and testament.

“XVII. I do further hereby will and declare that the bequests herein made to my said wife, Amelia Kerr, are in lieu of all dower or claim of dower in or to my estate. And I do hereby revoke all former or other wills and testaments at any time heretofore by me made, and I do hereby declare this instrument to be my last will and testament.

“XVIII. I give and bequeath all the principal left of my estate after the death of my wife, Amelia Kerr, to the societies, seminaries or institutions named in the fifth, sixth, seventh, ninth and tenth articles or bequests, to be divided according to the several amounts so bequeathed, *pro rata*.

“In witness whereof I have hereunto subscribed my name and affixed my seal this eighth day of December, eighteen hundred and seventy-six.

[L. s.]

“HENRY A. KERR.”

This will and testament was proved before the surrogate of the county of New York, February 1, 1877, as a will of real and personal estate, and letters testamentary were issued

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to the plaintiffs, Amelia Kerr and Walter Carter, February 8, 1877, who have since duly qualified and taken upon them the administration of the estate.

The amount of the estate of the testator exceeds \$500,000, of which over \$300,000 was invested at Grand Rapids, Michigan.

The action is brought for a construction of the will, it being claimed by the defendant, Holahan, that various of the legacies are void, and that the residuary clause is in contravention of the acts of 1860 and 1848.

George De Forest Lord, of counsel, for plaintiffs.

B. F. Watson, of counsel, for defendant Holahan.

R. W. De Forest, for defendants Dougherty and The Scotch Presbyterian Church of the City of New York.

Thatcher M. Adams, for the Union Theological Seminary of the City of New York, and the Board of Foreign Missions of the Presbyterian Church in the United States of America.

Walter Edwards, for the Presbyterian Board of Home Missions, and the Board of Home Missions of the Presbyterian Church in the United States of America, and The New York City Mission and Tract Society, and The Trustees of the General Assembly of the Presbyterian Church in the United States of America, and The Presbyterian Board of Relief for Disabled Ministers and Widows and Orphans of Deceased Ministers.

Charles C. Shelton, for Amelia Kerr, executrix, and Henry W. Hinsdale, administrator (with the will annexed).

A. B. Belknap, for the Presbyterian Hospital, in the city of New York.

M. M. Budlong, for the New York Bible Society.

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VAN BRUNT, *J.* — The first question to be considered is as to the validity of the legacy of \$10,000 given in the second clause of the will to Edward H. Dougherty, in trust for the sole use and benefit of his two daughters.

It is claimed, by counsel for the defendant, Holahan, that this legacy is void, because there is no trust created by it which a court of equity could enforce at any time; because the last clause, if either of them die before receiving her share, then the balance is to be given to the survivor, is indefinite; and because the trust sought to be created is void, as being contrary to the provisions of the statute respecting perpetuities.

I do not think that there is any difficulty in determining what was the intention of the testator in the second clause of his will.

The testator evidently intended to place in the hands of Edward H. Dougherty a fund of \$10,000, the income of which should belong to the two daughters equally, and that they should be equally interested in the principal; and that the trustee should have the power at such times as he should think proper, to advance to either of his said daughters the whole principal of such daughter's one-half of the legacy, or any portion of it, and in case either of the daughters should die before her half of the principal had been advanced to her, the balance of her half of the legacy remaining unadvanced is given absolutely to the survivor.

There does not seem to me to be any doubt but that the foregoing is a true interpretation of the language of the testator as contained in the second clause of his will.

There is no such ambiguity or uncertainty as makes it impossible to ascertain the intention of the testator.

The next question to be considered is, whether or not the trust is void as being contrary to the provision of the statute. I am unable to see that it in any way conflicts with the statute. There is no suspension of the power of alienation beyond two lives in being under any circumstances. The trust terminates as to one-half of the legacy upon the death of the first

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of the beneficiaries, and as to the balance, it terminates upon the death of the survivor. Under no circumstances could the trustee hold any portion of the legacy after the death of the survivor. The provisions of the second clause of the will are, therefore, valid.

The next article of the will which is attacked is the fifth clause, which reads as follows: "I give and bequeath unto the directors of the Union Theological Seminary of the City of New York the sum of ten thousand dollars, to be invested as a permanent fund in stocks or bonds of the United States or of the state of New York, the interest of which shall be given as support to such student or students of said seminary studying with a view to the Christian ministry as shall be selected for the gift by the directors."

The defendant, Holahan, claims that this legacy is void, because, by law, the Union Theological Seminary had no chartered rights to take, by last will and testament, and permanently invest the principal and expend the interest or income of the gift during all time, "in support of such student or students of said seminary studying with a view to the Christian ministry as shall be selected for the gift by the directors," and because no purposes whatever have been enumerated in the act establishing this corporation, and no object to be attained by the creation of the same is set forth in its charter.

The last objection is untenable. The "title" of the act of incorporation sufficiently indicates the purposes and object to be attained by the creation of the same. The act incorporates The Union Theological Seminary; and theological seminary, I think, is universally understood to be an institution in which young men, desiring to enter into the ministry, are instructed in theology; and that the object of the institution was for instruction in *Christain* theology, is evidenced by the fact that one-half of its board of directors must be clergymen — a name applied only to ordained ministers belonging to some denomination of *Christains* — and also by the fact

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that none but Christain students have the right to avail themselves of the benefits of the institution. The purposes of the institution are distinctly set forth in the title of the act of incorporation, as well as those of the theological seminary at Auburn, in the preamble of its act of incorporation giving to the words "theological seminary" the meaning ordinarily applied thereto, as above stated.

The objection that the legacy being given as support to the students of the seminary, which is not one of the specified purposes of the incorporation of the seminary, cannot be maintained, because, if the object of the incorporation is the instruction in theology, &c., the support of such students would seem to be included in the general scope of the purposes of an institution of that description.

The defendant, Holahan, raises the further objection to this legacy, that it is void by the provisions of section 6, of chapter 319, of the Laws of 1848. This question being raised as to the validity of several other legacies, its consideration will be reserved for a subsequent portion of this opinion.

The next article of the will which is attacked is the sixth, which reads as follows: "I give and bequeath unto the Presbyterian Board of Foreign Missions the sum of five thousand dollars."

There seems to be no serious objection raised against the validity of this legacy.

The next article of the will which is attacked is the seventh, which reads as follows: "I give and bequeath unto the Presbyterian Board of Home Missions the sum of five thousand dollars."

In 1862 the legislature of the state of New York passed an act incorporating the Presbyterian Committee of Home Missions, giving it the power of taking, receiving and holding real and personal estate, and providing that no devise or bequest to such corporation in any will made by an inhabitant of the state, shall be valid unless made and executed at least two months before the death of the testator or testatrix. In

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1871 the name of this corporation was changed to that of "The Presbyterian Board of Home Missions," the very title used in the seventh clause of the will under consideration. In 1872 the legislature incorporated the "Board of Home Missions of the Presbyterian Church in the United States of America."

The fifth section of the act of incorporation is as follows: "The Presbyterian Committee of Home Missions, incorporated under the laws of the state, by an act passed on the eighteenth day of April, eighteen hundred and sixty-two, the name of which was changed to that of the Presbyterian Board of Home Missions, by an act passed on the twentieth of January, eighteen hundred and seventy-one, are hereby authorized to assign, transfer, convey and deliver unto the corporation created by this act all the property, estates, rights of any and every description now held or enjoyed by them and which may hereafter be received by them by virtue of any grant, gift, bequest or device, or otherwise howsoever, which assignment, transfer, conveyance and delivery the corporation established by this act is hereby authorized and empowered to accept and receive; and the said corporation hereby created shall be and is hereby declared to be the legal successor of the said Presbyterian Board of Home Missions, formerly the Committee of Home Missions, and shall have, hold and use and enjoy all the corporate powers, franchises and privileges of said corporation last named, and all the property, estate and rights so assigned, transferred, conveyed and delivered, in the same manner, to the same extent as the said corporation last named might have done, and shall be entitled to receive, sue for and recover all legacies, devises, bequests and property which have heretofore been or may hereafter be made or given to the said corporation last named, provided, however, and it is hereby expressly declared, that the said property, estates and rights shall be held upon the same trusts, and for the same purposes only as the same are or otherwise would be

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held by the said Presbyterian Board of Home Missions, formerly the Presbyterian Committee of Home Missions."

The fourth section of the act authorizes the last-named corporation to receive real and personal property, subject, however, to all the provisions of law relating to devises and bequests by last will and testament.

This last corporation claims that it is the body intended by the testator in the seventh clause of his will.

There being a corporation of the exact name mentioned in the will, I think that we must necessarily find that such corporation was the one intended.

Such being the case, the legacy is claimed by the defendant, the Board of Home Missions of the Presbyterian Church in the United States of America, as the legal successor of the Presbyterian Board of Home Missions, section 5 of the act expressly declaring that the Board of Home Missions, &c., shall be the legal successors of the Presbyterian Board of Home Missions, and that it shall be entitled to receive, sue for, and recover all legacies, devises, bequests and property which have heretofore been, or may hereafter be, made or given to the said corporation named.

The language clearly shows that the corporation of the Presbyterian Board of Home Missions, as a corporation, still exists, and that the legislature, by the act of 1872, did not intend to deprive it of its corporate franchises, and that it was capable of having bequests made to it. Such bequest must, however, necessarily be subject to the restrictions of the act creating that body, and if that corporation had no power to receive the bequest, I can conceive of no method by which another corporation, as its successor and representative, can enforce the payment of a legacy which the original corporation had no power to receive.

The legacy, therefore, to the Presbyterian Board of Home Missions, is void.

The next article of the will which is attacked is the eighth clause, which reads as follows: "I give and bequeath unto

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the New York Bible Society the sum of one thousand dollars." It is very evident that the testator meant in that clause of the will the New York Bible Society.

This corporation was formed under the general act of 1848, and the question arises as to whether the restrictions of the sixth section of that act still exists.

The case of *Lefevre* agt. *Lefevre* (59 *N. Y.*, 434), is referred to as an authority, by the counsel for the Bible Society, to show that the act of 1860 repealed so much of section 6 of the act of 1848 as was inconsistent therewith, and the same case is also appealed to by the counsel for the defendant, Holahan, as an authority for the position that the restrictions of section 6 of the act of 1848 apply to the New York Bible Society.

It is impossible to tell, from the report of the case above named, how far the court concurred in the opinion of Mr. justice FOLGER, but they must have concurred in that portion of his opinion which held that the statute of 1860 did not affect or restrict the operation of the two months' clause of section 6 of the act of 1848.

This being true, the bequest to the New York Bible Society cannot be sustained, the will of the testator having been made less than two months prior to his death.

The next article in the will which is attacked, is the ninth clause, which reads as follows: "I give and bequeath unto the New York City Mission and Tract Society the sum of one thousand dollars."

This society was incorporated by chapter 63 of the Laws of 1866. Section 1 of the act gives it the power to take by devise real and personal property not exceeding \$50,000 yearly value, subject to any provisions of law in relation to devises and bequests by will.

It is contended that this legacy is wholly void, because of the limitations contained in the act of 1848, section 6.

This objection will be considered in connection with the same objection as to other corporations.

The next article of the will which is attacked is clause tenth,

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which reads as follows: "I give and bequeath unto the Trustees of the General Assembly of the Presbyterian Church of the United States of America, for the use of the Fund of Disabled Ministers, the sum of five thousand dollars."

In view of the conclusion to which I have arrived in respect to this legacy, it is unnecessary to discuss the question as to whether the defendant, the Trustees of the General Assembly of the Presbyterian Church in the United States of America, or the defendant, the Presbyterian Board of Relief for Disabled Ministers, and the widows and orphans of deceased ministers, was the corporation intended to be named by the testator in the tenth clause of his will.

Both of these corporations are organized under the laws of Pennsylvania. The first, under a special act of the general assembly of Pennsylvania, passed in 1799, and a supplement passed in 1864. The latter was organized under a general law of the commonwealth of Pennsylvania, in 1876. In 1855, the general assembly of Pennsylvania passed an act, sections 11 and 15 of which are as follows:

"XI. No estate, real or personal, shall hereafter be bequeathed, devised or conveyed to any body politic, or to any person in trust for religious or charitable uses, except the same be done by deed or will, attested by two creditable and at the time disinterested witnesses, at least one calendar month before the decease of the testator or alienor, and all dispositions of property contrary hereto shall be void and go to the residuary legatee or devisee, next of kin or heirs according to law; provided that any disposition of property within said period *bona fide* made for a fair valuable consideration shall not be hereby avoided."

"XV. All dispositions of property hereafter made to religious, charitable, literary or scientific uses, and all incorporations or associations formed for such objects, shall be taken to have been made and formed under and in subordination to all the duties and requisitions of this act as rules of property and laws for their government."

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From the foregoing it appears that a bequest, such as is now under consideration, is, if made by a citizen of Pennsylvania, beyond all question, void.

It would appear that it has become part of the public policy of that commonwealth, as it has become that of most of the other states of the Union, to prohibit a testator, unless the act is accompanied with due deliberation, and unless such time is allowed to elapse as gives an opportunity to revoke the same, if hasty or ill-considered, from setting aside the claims of those whom he is leaving behind him, and who have a natural right to look to him for some provision for their future life, and the giving of his fortune to religious and charitable corporations. It allows a testator to make any disposition of his property which he desires, accompanied with due deliberation, but wisely prohibits a disposition which is so open to abuse, and which is so frequently made under conditions which entirely warp the judgment.

The wisdom of the acts of 1848 and 1860, of the state of New York, could hardly have a better exemplification than is furnished by the facts of the present case. The testator having a sister, with whom he seems to have been on friendly terms, and who was a widow, with two children, and who was compelled to keep a boarding-house to support herself and family, gives the whole of his estate, amounting to over a half of a million dollars, to religious corporations, excepting the pitiful sum of \$1,000, which he gives to his sister.

In the case of *Chamberlain agt. Chamberlain* (43 N. Y., 424) the court of appeals have laid down with great distinctness the rules which are to govern in determining the validity of legacies by citizens of this state to corporations of foreign states.

The court say as follows :

“Personal property has no locality, and, therefore, the law of the domicile of the owner governs its transmission, either by last will and testament, or by succession, in case of intestacy (2 *Kent Com.*, 429; *Moulton agt. Hunt*, 23 N. Y., 394;

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Laurence agt. Kitteridge, 21 Conn., 577). But if, within the *lex domicilii*, a will has all the forms and requisites to pass title to personalty, the validity of particular bequests will depend upon the law of the domicile of the legatee and of the government to which the fund is, by the terms of the will, to be transmitted for administration, and the particular purposes indicated by the testator. Whatever may be the law of Pennsylvania, a testator domiciled in that state cannot establish, by bequests of personalty to citizens or corporations of this state, a charity or trust to be administered here inconsistent with the policy or the laws of this state. A gift by will of a citizen of this state to a charity, or upon a trust to be administered in a sister state, which would be lawful in this state, the domicile of the donor, would not be sustained if it was not in accordance with the laws of the state in which the fund was to be administered.

“Bequests in aid of foreign charities, valid and legal in the place of their existence, will be supported by the courts of the state in which the bequests are made (*Hill on Trustees*, 457). If the legatee, whether a natural or artificial person, and whether he takes in his own right or interest, is capable, by the law of his domicile, to take the legacy in the capacity and for the purposes for which it is given, and the bequest is, in other respects, valid, it will be sustained, irrespective of the law of the testator's domicile, subject, however, to this qualification, that if the law of the testator's domicile, in terms, forbid bequests for any particular purpose, or in any other way limit the capacity of the testator in the disposal of his property by will, a gift in contravention of the law of the testator's domicile would be void everywhere.”

It will thus be seen that, in order that bequests in aid of foreign charities, made by citizens of this state, shall be supported by the courts of this state, it is necessary that the bequest shall be valid and legal in the state where the charities exist. In other words, this state will not support a bequest to a corporation which is void by the laws of the state in

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which the recipient is situated, or where it appears that such bequest is against the public policy of that state.

It is no answer to this objection to say that the Trustees of the General Assembly, &c., having been chartered by special act in 1799, their powers cannot now be restricted by the act of 1855, because, as has already been shown, the question is whether a bequest made under the circumstances which the bequest under consideration was made is valid by the laws of Pennsylvania.

It appearing that this bequest, being in contravention of the act of 1855, is void in Pennsylvania, the domicile of the legatee, it is consequently void in New York, the domicile of the testator.

The legacy contained in the eleventh article of the will seems to be valid.

The legacy contained in the twelfth article of the will, of \$1,000 to the Sabbath schools of the Scotch Presbyterian Church, cannot be supported.

There is no beneficiary named who has the power to take. It would be a great stretch of construction to put in the name of the Scotch Presbyterian Church as beneficiary, limiting the use of that legacy to the Sabbath schools.

The next article of the will which is attacked is the thirteenth, which reads as follows: "I give and bequeath unto the Presbyterian Hospital the sum of one thousand dollars, for which aid and care is to be given to any of the members of the Scotch Presbyterian Church who may require aid in sickness."

The objection raised to this legacy is that it is void by the provisions of section 6 of the act of 1848, and this brings us to the consideration of the question as to how far this section of this act is applicable to the various corporations heretofore mentioned.

The act amending the charter of the Union Theological Seminary, passed in 1870, provides that it shall be lawful for it to take by devise or otherwise, subject to all the provisions

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of law relating to devises and bequests by last will and testament.

The act incorporating the New York City Mission and Tract Society, chapter 63 of the Laws of 1866, provides that it shall be capable of taking by purchase or devise for the uses and purposes of the corporation, subject to any provisions of law in relation to devises and bequests by will.

The act incorporating the Presbyterian Hospital, in the city of New York, chapter 15 of the Laws of 1868, provides that it shall be capable of taking by devise or otherwise, so far as the same is in accordance with the general laws of the state and not otherwise.

The act incorporating the Board of Home Missions of the Presbyterian Church, &c., chapter 287 of the Laws of 1872, provides that it may take by devise, subject, however, to all the provisions of law relating to devises and bequests by last will and testament.

It is thus seen that the right of the four above-named corporations to take by devise or bequest is restricted by the law of their incorporation, and is thereby made subject either to all the provisions of law relating to devises and bequests, or subject to any provision of law relating to devises or bequests, or subject to the general laws of the state.

Section 6 of the act of 1848 would seem to be certainly a provision of law in respect to devises and bequests by last will and testament, and it indicates the general policy of this state in reference to devises and bequests to corporations incorporated for benevolent purposes.

It is true that the provisions of this section, by its terms make it applicable only to corporations formed under the act containing it.

That the legislature has the right to make this provision of law applicable to such corporations as they might see fit, other than those incorporated under the act of 1848, could not be seriously questioned, even if the proposition had not been

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determined by the court of appeals as it has been done in the case of *Lefevre* agt. *Lefevre*, above mentioned.

It may be true that the act of 1860 may indicate a change of policy in some respects upon the part of the state, but it in no way interferes or is inconsistent with the two months' limitation contained in the act of 1848.

If this limitation in section 6 of the act of 1848, still exist, then, if the privileges of a corporation are made expressly subject to any and all provisions of law, how can they be exempted from the operation of this provision?

At the time of the incorporation of these associations section 6 of the act of 1848 and the act of 1860, were the only provisions of law of any general character which related to benevolent corporations.

That the provisions of the act of 1848, are general in their character is conceded by both of the opinions in the case of *Lefever* agt. *Lefever*, above mentioned.

In the charters above referred to, the legislature, by their language, clearly indicate that they had in mind the fact that there was more than one provision of law in relation to devises and bequests to benevolent associations, because they say that the right to take by devise shall be subject to all the provisions of law or any provision of law; language inconsistent with the idea that reference was had to a single provision of the legislature regulating devises and bequests to benevolent corporations, as would be the case if all the provisions of the act of 1848 are excluded.

That this view is correct seems to be placed beyond all doubt when we consider what the legislature do when they intend that the restrictions of the act of 1860 only shall apply to a corporation which they are incorporating.

In 1862, the Board of Foreign Missions of the Presbyterian Church, &c., was incorporated by the legislature, and was given the power of taking by devise and was made subject to the provisions of chapter 360 of the Laws of 1860. Language very different from that used in the charter previously named.

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The language used in the charter of the Presbyterian Hospital to take by devise, subject to the general laws of the state, is different from that which we have been considering, but it adds a further strong argument in favor of what has been already said in reference to the intention of the legislature.

This language clearly imports that the legislature had in view the existence of more than one law regulating devises and bequests to charitable institutions. They make the Presbyterian Hospital's power to take by devise subject to the general "laws" of the state, and by the use of the word "laws" instead of "law," we must assume that it was done with deliberation and knowledge of what previous legislation had been, and as the acts of 1860 and 1848 were the only laws upon the statute book relating to the subject, which were general in their character, the legislature must have intended to refer to these acts when they speak of the general laws of the state relating to this subject.

The legacies, therefore, to the Union Theological Seminary, the Presbyterian Board of Home Missions, the New York City Mission and Tract Society, and the Presbyterian Hospital, are void.

The next question to be considered is the provision of the will reading as follows: "The legacies are to be paid as soon as the amounts can be collected out of funds now invested on bond and mortgage at the city of Grand Rapids, Michigan."

Some of the parties claim that this direction requires all the legacies to be provided for out of the income *only* of the property in Michigan, as it should be received. Others claim that the principal only should be applied to the payment of legacies, and others again claim that both the principal and interest of the property, as fast as received, should form the fund out of which the legacies should be paid. I think the latter expresses the true intention of the testator. It seems to be evident that the testator intended that the legacies should be paid as soon as possible out of his moneys invested in Michigan, and after the payment of these legacies the widow is

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to be entitled to the income of all of the estate during her life.

That is, that a sufficient amount of the funds invested in Michigan to meet the legacies should be collected as soon as possible by the executors, and that after such fund should be provided, the widow should be entitled to the income on the balance.

The next question which is raised and which it is necessary to consider is the validity of the bequest to Amelia Kerr, the widow, during her life, of the net income of the estate after the payment of the legacies.

I can see no valid objection to the validity of this portion of the will. It is entirely evident what the intention of the testator was, and he has expressed such intention in language reasonably certain. He intended to give to his widow the income of all of the estate after the payment of the legacies, and, I think, that it is very evident that the executors named in the will are the trustees under the will to hold this estate during the lifetime of Mrs. Kerr, and collect the income therefrom, and pay the same to her during her life.

This evident intention of the testator cannot be defeated because of the failure of certain of the legacies to vest.

There is no rule of construction which imposes such a penalty, because a will contains an invalid legacy.

It follows from this that no part of the estate, except such as it will subsequently appear Mrs. Kerr is entitled to receive under the statute of distribution, is to be paid over to her, but is to be held by the executors as trustees under the will.

It is also apparent that the duties of the executor and administrator with the will annexed appointed by the probate judge in Michigan, after paying and satisfying, in due course of administration, all debts or claims of any kind existing in favor of any persons, residents in Michigan, are to transfer and pay over the rest of the estate in their hands to the plaintiffs, as the principal executors charged with the payment of debts and legacies and with the final distribution of the estate,

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the fund so received after the payment of debts and legacies to be held by the plaintiffs as trustees under the will.

The only remaining questions to be considered, are as to the construction of the eighteenth, inaptly called the residuary, clause of the will, and the question as to what disposition must be made of the void legacies. I do not think that the criticism made by the counsel for the defendant, Holahan, as to the uncertainty as to the names of the beneficiaries intended in the eighteenth clause of the will, is well taken.

The testator evidently referred to the numbers attached to the several articles of his will.

The eighteenth clause of the will reads as follows: "I give and bequeath all the principal left of my estate, after the death of my wife, Amelia Kerr, to the societies, seminary or institutions named in the fifth, sixth, seventh, ninth and tenth articles or bequests, to be divided according to the several amounts so bequeathed, *pro rata*."

It is conceded by all the parties that the above bequests are subject to the act of 1860, and that the same are valid only to the extent of one-half of the estate of the testator, the valid legacies previously given being included in that one-half. This section distributing the principal left of the estate, after the death of his wife, to the societies, seminary or institutions named in the fifth, sixth, seventh, ninth and tenth articles to be divided according to the several amounts so bequeathed, *pro rata*, when fully stated, is to be read as follows: I give and bequeath all the principal left of my estate, after the death of my wife, to the following named societies, seminary or institutions in the following proportions, to wit:

To the Union Theological Seminary of the city of New York, ten twenty-sixth parts thereof.

To the Presbyterian Board of Foreign Missions five twenty-sixth parts thereof.

To the Presbyterian Board of Home Missions, five twenty-sixth parts thereof.

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To the New York City Mission and Tract Society, one twenty-sixth part thereof.

To the Trustees of the General Assembly of the Presbyterian Church of the United States of America for the use of the fund of disabled ministers, five twenty-sixth parts thereof.

After the word "estate" in the foregoing bequest, the law of 1860, inserts the words "not exceeding more than one-half thereof after the payment of my debts."

When this eighteenth clause is read in the manner indicated, it is apparent that the residuum is not given to these corporations as a class, but that the proportion of each is distinctly specified in the will, and that, if any of the bequests are void, as to such bequests the testator has died intestate and they must be distributed under the statute of distribution (*Downing* agt. *Marshall*, 23 *N. Y.*, 382; *White* agt. *Howard*, 46 *N. Y.*, 144).

As to that portion of the estate as to which the testator has died intestate, the plaintiff, Mrs. Kerr, is entitled to receive her share as provided for by the statute of distribution (*Hoes* agt. *Van Hoesen*, 1 *Barb. Chan.*, 396).

It follows, therefore, that the bequest in the second article of the will of \$10,000 to Edward H. Dougherty, in trust, is valid.

That the bequests in the sixth article of the will to the Presbyterian Board of Foreign Missions, and in the eleventh article of the will to the Board of Trustees of the Scotch Presbyterian Church, are valid.

That the bequest in the fifth article of the will to the Union Theological Seminary, and in the seventh article thereof to the Presbyterian Board of Home Missions, and in the eighth article thereof to the New York City Bible Society, and in the ninth article thereof to the New York City Mission and Tract Society, and in the tenth article thereof to the Trustees of the General Assembly of the Presbyterian Church, &c., and in the twelfth article of the will to the Sabbath school of the Scotch Presbyterian Church, and in the thirteenth article of the will to the Presbyterian Hospital, are void, and that

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the testator has died intestate as to the sums mentioned in said void bequests, and the same must be distributed to his widow and next of kin, according to the statute of distribution.

That the principal and interest of the funds invested in Michigan are to be devoted to the payment of the legacies.

That the bequest in the fifteenth article of the will of all the net income of the testator's estate, after the payment of the legacies to the testator's widow, Amelia Kerr, during her lifetime, is valid, she being entitled to receive the income during her life, the executors named in the will holding the principal of the estate as trustees, for the purpose of collecting the income during the life of Mrs. Kerr, and for the purpose of distributing the principal after her death.

That the bequest in the eighteenth article of the will, by which the testator bequeaths to the societies named in the fifth, sixth, seventh, ninth and tenth articles of the will, all the principal left of his estate, after the death of his wife, is void, so far as it attempts to dispose of, including the hereinbefore mentioned valid legacies, more than one-half of the testator's estate as it existed at the time of his death, and that as to such excess the testator died intestate and the same is to be distributed according to the statute of distribution.

That the bequests in the eighteenth article of the will, to the Union Theological Seminary, to the Presbyterian Board of Home Missions, to the New York City Mission and Tract Society, and to the trustees of the General Assembly of the Presbyterian Church, &c., are void.

That the legacy in the eighteenth article, to the Presbyterian Board of Foreign Missions, is valid, and that under such bequest the said board, upon the death of Mrs. Kerr, is entitled under the rule laid down in the note to the case of *Chamberlain* agt. *Chamberlain* (we being left entirely in the dark as to the reason for the modification of the result arrived at in the opinion, contained in the note, the opinion seeming to be better law), to five twenty-sixth parts of the whole estate left at the death of Mrs. Kerr.

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The testator having died intestate as to all of his estate mentioned in the eighteenth clause of his will, except as to five twenty-sixth parts thereof, Mrs. Kerr, his widow, is entitled to receive her share under the statute of distribution, the defendant, Holahan's, share being subject to the life estate of Mrs. Kerr.

● SUPREME COURT.

EZEKIEL J. DONNELL agt. GEORGE W. WILLIAMS *et al.*

ROBERT H. ROUNTREE *et al.* agt. THE SAME.

*Attachment — what must be stated in affidavit upon which it is procured —
Partners — Non-residents — Service — Code of Civil Procedure, section 636.*

In an action against the members of a firm, the plaintiff, D., procured an attachment upon an affidavit which omitted to state that the amount which he claimed was due over and above all counter-claims known to him. Both defendants were non-residents. The one, B., upon whom personal service in the action was made appeared, but interposed no defense. The other, W., was not personally served with process, and publication was not made within the thirty days required by the statute. In an other action by R., the attachment issued was also against both defendants, one of whom, B., appeared, but interposed no defense, and the other, W., was duly proceeded against by advertisement:

Held, that D's attachment was bad, *ab initio*, because of the failure to comply with section 636 of the Code of Civil Procedure, in omitting to state that the plaintiff was entitled to recover the sum specified over and above all counter-claims known to him (*Per* BARRETT, J.).

Held, also, that the effect of non-publication was to destroy the attachment of D. as to W., and were it not for his failure to comply with section 636, the plaintiff, D., would be entitled to retain his attachment as to B. for whatever it was worth. It could not be absolutely discharged merely because no lien upon the firm's property had been thereby acquired (*Per* BARRETT, J.).

First Department, General Term, March, 1880.

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APPEAL from order denying motion to vacate attachment in the first-entitled action.

J. A. Shoudy, for appellant.

F. J. Dupignac, for respondents.

BRADY, *J.*— The plaintiff, Donnell, procured an attachment upon an affidavit which omitted to state that the amount which he claimed was due over and above all counter-claims known to him; and the error, though inferentially, was not directly, corrected by any positive averment subsequently made. Both of the defendants were non-residents. The one upon whom personal service in the action was made appeared, but interposed no defense. The other was not personally served with process, and publication was not made within the thirty days required by the statute.

The attachment issued at the suit of Rountree was also against both defendants, one of whom appeared, but interposed no defense, and the other (Williams) was duly proceeded against by advertisement according to law.

The application to discharge the attachment, granted at the instance of Donnell, was founded, therefore, upon the invalidity of the attachment, but chiefly upon the ground of the omission already stated. The effect of the non-publication required as to Williams in the attachment obtained by Donnell left that process effective only against the defendant Birnie; and without passing upon the question whether, even as to him, it was not invalid by reason of the omission mentioned, and, assuming the contrary, it reached only his individual interest in the copartnership property, and the firm having been insolvent at the time the attachment was issued, that interest amounted to nothing.

This result has been distinctly declared in the case of *Staats* agt. *Bristowe* (73 *N. Y.*, 264).

The learned justice, in deciding this motion in the court

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below, was under the impression that the case quoted was one brought against one member of a copartnership for his individual debt. But this was erroneous. It was brought against the firm of which the person proceeded against by attachment was a member. Applying the rule stated, the attachment issued on behalf of Donnell did not affect the partnership property, and none of the partnership assets, therefore, were covered by it; and its application to that property was not secured by virtue of any lien acquired by the attachment issued. It is not so, however, with the attachment issued by the plaintiff, Rountree, and others, because it was perfected as to both defendants, and, therefore, was effectual as a lien upon their property jointly, because the individual rights of each, as to the partnership assets, were affected by it.

The result of these considerations is that the attachment, issued upon the application of Donnell, should be discharged, because no lien had been acquired by it, so that full force and effect should be given to the attachment obtained by Rountree and others and an apparent obstacle to their lien removed.

The order appealed from should be reversed.

BARRETT, *J.*—I concur in the result, but upon other grounds from those stated by Mr. justice BRADY. I agree with him that the effect of non-publication was to destroy the attachment as to Williams, and that the cause proceeded thenceforward precisely as though the attachment had originally issued against Birnie alone. That brought the case directly within *Staats agt. Bristowe* (73 *N. Y.*, 264), namely, a suit pending against the firm, with an attachment therein against but one of its members.

But were the case free from other difficulties, the plaintiff, Donnell, would be entitled to retain his attachment as to Birnie for whatever it was worth, and we could not discharge it absolutely merely because no lien upon the firm property had been thereby acquired. We might set it aside as against Williams and leave the law to take its course.

Delamater *et al.* agt. Byrne.

But I think Donnell's attachment was bad, *ab initio*, because of the failure to comply with section 636 of the Code of Civil Procedure in omitting to state that the plaintiff was entitled to recover the sum specified over and above all counter-claims known to him. This provision was new and was undoubtedly intended as a safeguard against the wrongful and oppressive use of this remedy, in cases where the plaintiff, though having a cause of action against the defendants, knows very well that the latter has a counter-claim equal to the demand or some part of it. This was a matter of substance and could not be disregarded. It was a prerequisite to the granting of the attachment. Upon this ground, I think, the order should be reversed and the Donnell attachment vacated.

DAVIS, P. J., concurs with BARRETT, J.

SUPREME COURT.

CORNELIUS H. DELAMATER *et al* agt. P. H. BYRNE.

Undertaking on appeal to court of appeals — sufficiency of — What constitutes a householder — Code of Civil Procedure, sections 812, 1826.

A *surety*, upon an undertaking given on an appeal to the court of appeals, pursuant to section 1826 of the Code of Civil Procedure, who is engaged in the milling business, and who rents and occupies a mill within the state and owns the machinery therein, is to be deemed a "householder," within the meaning of section 812 of the Code of Civil Procedure, and is sufficient for the purpose of the undertaking.

Special Term, November, 1879.

William Sparks, for plaintiffs and respondents.

Charles G. Cronin, for defendant and appellant.

AN appeal to the court of appeals was taken by the defendant in this case from an order of the general term affirming an order of the special term.

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An undertaking was given on such appeal under section 1326 of the Code of Civil Procedure, with two sureties. The sureties having been excepted to they justified upon notice, when it appeared that one was the owner of real estate in Oneida county, in this state, and the other was a resident of Brooklyn, unmarried, without immediate relatives and boarded; it further appeared that he was engaged in the milling business in Brooklyn, where he leased a mill, the machinery in which he owned.

This surety was objected to by plaintiffs after justification, on the ground that he was neither a "freeholder or householder within the state," within the meaning of section 812 of the Code of Civil Procedure.

It was insisted for the plaintiff that the surety was not sufficient under section 812 of the Code of Civil Procedure (*Blood* agt. *Wilder*, 6 *How.*, 446; *Griffin* agt. *Sutherland*, 14 *Barb.*, 456; 1 *Bouv. L. Dict.*, 673; *Woodward* agt. *Murray*, 18 *John.*, 400; *Browne* agt. *Witt*, 19 *Wend.*, 475).

It was claimed for the defendant and appellant that the surety was sufficient for the purpose of the undertaking; that the costs of the court of appeals in no event would exceed \$200. That there was a distinction between a householder under the Revised Statutes (3 *R. V.*, 626), and a householder under the Code, for the purpose of bail. That under the Revised Statutes the intent was to protect the head of a family from execution against certain "household" articles, while the intent of the provision of the Code was to secure the continuance of residence within the state, citing *The Somerset Savings Bank* agt. *Huyck* (33 *How.*, 323).

And that the sufficiency of sureties on appeal is purely within the discretion of the judge to whom the undertaking is submitted for approval, citing 57 *Howard*, 170.

After advisement judge VAN VORST held the justification sufficient and approved the undertaking.

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SUPREME COURT.

JANE S. DEDERICK agt. OLIVER FISK, United States marshal.

Jurisdiction — State and federal courts — when action in state court will be stayed pending an appeal to United States supreme court.

Where an action was brought against defendant, a United States marshal, for the alleged conversion of certain goods, and after the plaintiff had given the proof necessary to make out a *prima facie* cause of action the case of the defendant was stated and opened, the defense being that the goods for which the plaintiff sought to recover were really the property of D. & S., a mercantile firm; that proceedings in bankruptcy had been instituted against such firm and a warrant had been duly issued out of a United States district court to the defendant, as a United States marshal, which commanded him to take the property of said firm, and by virtue thereof he had taken the property in question; evidence which consisted in part of proof tending to show that the alleged sale of the goods to the plaintiff was fraudulent and void as to the creditors of the bankrupt firm was objected to upon the ground that a United States marshal, with a warrant such as that held by the defendant, was in no position to attack a sale on the ground of fraud, as under the bankrupt law he could only take property of the bankrupt in his possession, the title to which was undisputed, citing the case of *Doyle agt. Sharpe* (74 N. Y., 154), on the faith of which the objection was sustained, the evidence excluded and the defendant was allowed to withdraw a juror on payment of costs and to amend his pleadings; the defendant now moves to stay the trial of this cause pending a decision upon an appeal which has been taken to the supreme court of the United States in the case of *Doyle agt. Sharpe*:

Held, that, as *Doyle agt. Sharpe* has been treated as one foreclosing all defense to this action, and as the appeal in that case presents a grave question which may be decisive of the present action, the appeal being now pending in the United States supreme court, the decision of which tribunal must control, this action will be stayed to await the decision on such appeal.

Special Term, August, 1879.

MOTION by defendant to stay the trial of this action pending an appeal in *Doyle agt. Sharpe* (74 N. Y., 154), to the supreme court of the United States.

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C. Whittaker, for defendant and motion.

F. L. Westbrook, for plaintiff and opposed.

WESTBROOK, *J.*—At a circuit court held in and for the county of Ulster, in April, 1879, the trial of this cause was commenced. After the plaintiff had given the proof necessary to make out a *prima facie* cause of action, the case of the defendant was stated and opened. The defense was that the goods for which the plaintiff sought to recover were really the property of Dederick & Saulspagh, a mercantile firm doing business in Saugerties, Ulster county. That proceedings in bankruptcy had been instituted against such firm, and a warrant had been duly issued out of the district court of the United States for the southern district of New York, and delivered to the defendant as a United States marshal, which commanded him to take the property of said firm, and by virtue thereof he had taken the property in question.

When the defendant's counsel were about to call witnesses to establish their defense, which consisted in part of proof tending to show that the alleged sale of the goods to the plaintiff was fraudulent and void as to the creditors of the bankrupt firm of Dederick & Saulspagh aforesaid, such evidence was objected to by the counsel for the plaintiff, upon the ground, that a United States marshal, with a warrant such as that held by the defendant, was in no position to attack a sale on the ground of fraud, as under the bankrupt law he could only take property of the bankrupt in his possession, the title to which was undisputed. The case of *Doyle and others* agt. *Sharpe* (now reported in 74 *N. Y.*, 154), was cited from an abstract in the Weekly Digest in support of the objection. On the faith of that report the objection was sustained and the evidence excluded, the defendant being allowed to withdraw a juror on payment of costs of the circuit, and to amend his pleadings upon terms as then directed.

The defendant now moves to stay the trial of this cause, in

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the state courts, pending a decision upon an appeal which has been taken to the supreme court of the United States, in the case of *Doyle* agt. *Sharpe*, and which, it is claimed, will there be soon determined.

If the decision, which the plaintiff obtained at the Ulster circuit, was right, very clearly the motion ought to be granted.

The defendant, relying upon several decisions in the federal courts, had seized the property in question in behalf of creditors of a bankrupt firm, intending to litigate the *bona fides* of the plaintiff's title. If the state courts have held that a marshal holding such a warrant as the defendant held was in no position to raise the question of fraud, or to dispute the title of the claimant, it would seem that justice requires when a cause is now pending on appeal to the federal court, which will present that question, to stay an action pending in the state court. This would be just to all parties; to the defendant, because he ought not to be barred from his defense, if he has one, and to the plaintiff, also, who would thus be saved from a heavy expenditure, if the law as maintained in the state courts is reversed.

On the present motion, however, it is now maintained by the plaintiff's counsel (it is not the same counsel who appeared for the plaintiff at the circuit) that the court held wrong at the circuit, and, as the reported case in 74 *N. Y.* shows, the court of appeals never decided that the question of fraud could not be litigated by a marshal seizing property as the defendant has seized it. A careful reading of the full report of *Doyle, and others*, agt. *Sharpe* induces me to believe that he is right in his view. The question of fraud was litigated upon that trial (*see page 155*), and the submission thereof to the jury was approved. The judge, on page 156, says: "The question whether the plaintiffs were *bona fide* purchasers, for a valuable consideration, and had possession on their own account, and for themselves, was one for the jury, and we are unable to see that it was improperly submitted to their consideration on the trial, by the judge in his charge. As they

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found for the plaintiff, their verdict is not the subject of review upon this appeal." And again, on page 159, he says: "If the views expressed are sound, then, the question as to the right of the plaintiffs was for the jury, and the judge committed no error in charging them that if Doyle, as a matter of fact, was in possession of the goods, claiming them as owner himself, that the plaintiffs were entitled to recover their value. The charge thus made presented the true construction to be put upon the statute and was entirely correct." It would seem from the opinion, construed by the light of these express declarations, that it had been claimed by the defendant, that as the warrant commanded him "forthwith to take possession, provisionally, of all the property and effects of the debtor, and safely keep the same until the further order of the court," he was absolutely protected in such seizure and that it was for the bankrupt court to adjudicate disputed questions of ownership. This proposition is probably the one which the learned judge combats, though the language separated from the rulings at the circuit, and from the expressed approval of the submission of the question of fraud to the jury, would seem to warrant the position taken by plaintiff's counsel at the circuit, and urged by the defendant on this motion, and also to justify the syllabus of the reporter to the case, as reported in 74 *N. Y.*, which syllabus certainly justifies the objection and the ruling at the circuit.

It matters not much, however, which view of the scope of the decision of the court of appeals is sound. It hardly rests with the plaintiff to now repudiate the soundness of a decision obtained in her behalf, and to defeat a motion made on the faith thereof. If the view taken at the circuit and based upon an imperfect report of a decision was wrong, and that case only decides what is herein stated, it is still obvious that a most important point remains to be settled by the federal court. The object and policy of the bankrupt law, as has frequently been urged, were to vest all questions concerning the estate of the bankrupt, and its distribution in the tribunal

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having jurisdiction of such proceedings by that act. If this be otherwise then state courts may decide what estate a bankrupt has for the federal courts to distribute, and thus really deprive them of their power to administer upon the assets, or by a claim of equal power to determine of what the estate consists, produce confusion by a collision of jurisdiction. We do not undertake to say where the power to decide conflicting claims of ownership of property arising upon the distribution of a bankrupt's estate should be lodged, whether in the state or national courts, or in either. Neither do we now decide whether, under the law as it existed, and irrespective of the decision of the court of appeals in *Doyle* agt. *Sharpe*, the bankrupt court alone had power to decide what property belonged to the estate it was invoked to distribute, or whether the state courts might or might not legally decide the same question; but we do say, however, that looking at the objects and purposes of the bankrupt act, and the provisions of the warrant issued by the district court of the United States in bankruptcy, that the marshal shall take possession of the property "provisionally * * * and safely keep the same until the further order of the court;" that a grave question is presented whether the marshal is not absolutely protected in so doing, and that a case which presents such a question to the federal court submits a proposition worthy of grave attention.

As the case of *Doyle and others* agt. *Sharpe*, has been treated as one foreclosing all defense to this action, and as the court can see that the appeal in that case does present a grave question which may be decisive of the present action, and that such appeal is now pending in the supreme court of the United States, the decision of which tribunal must control, this action will be stayed until the first day of January next, to await the decision on such appeal. If the cause is not then determined, the defendant may apply for a further order. If the appeal is not prosecuted to a speedy hearing the plaintiff may apply for relief. The defendant must also stipulate to

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take evidence of plaintiff or of any witness whose testimony she desires to perpetuate. Ten dollars costs of motion shall abide result of the action.

N. Y. COMMON PLEAS.

AGNES MAYER, individually and as executrix of the last will and testament of John M. Mayer, deceased, agt. JAMES McCUNE.

Specific performance — Will — Power of executrix to sell or exchange real estate — How far testator's indebtedness an incumbrance and lien as affecting title to property sold by executrix.

Where, in an action for the specific performance of a contract between the plaintiff and defendant for the sale and exchange of certain real estate, it appeared that the plaintiff was the owner in fee of the premises 487 West Thirty-ninth street, and assumed to convey the premises 412 West Fortieth street as executrix under the will of John M. Mayer; in said will the testator first directs the payment of his debts and then devises the premises last named to his wife, the plaintiff, for life or during widowhood, upon her death or remarriage the said premises were devised in fee to his surviving children or their issue. Full power was given to the plaintiff as such executrix at any time and on such terms as she might think satisfactory to sell, mortgage or lease the whole or any part of the testator's real estate, and to invest the proceeds of such sale in good and safe securities or purchase other real estate, to sell the said securities and real estate so secured or purchased, and to continue the said transfer or disposition of the real estate of said testator or the proceeds thereof as long, and to repeat the said operations as often as said executrix might think best and proper; provided, however, that the proceeds of such sale or other disposition of said real estate shall be considered real estate. It further appeared that a judgment had been recorded against the plaintiff, as executrix, as aforesaid, in an action commenced against the said John M. Mayer, deceased, in his lifetime, in whose place and stead the said executrix was substituted as defendant *pendente lite*. It was conceded that this judgment is still unpaid, and that the personal property of the deceased, in the hands of said executrix, does not exceed the sum of \$150:

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Held, that the objection that the plaintiff had no power to exchange the Fortieth street property is untenable. It would seem a fair and rational construction of a power as broad in its terms as the one contained in the will, to hold that it would authorize a direct exchange which would accomplish the result of a sale, and a purchase of other realty in a single transaction and carry into effect the obvious intention of the testator.

Held, also, that the objection that plaintiff cannot give a warranty deed or sell the property in fee simple is equally untenable. She could certainly give a valid title under the power in the will and, if she saw fit, could give her personal warranty of the title.

A purchaser has no right to expect from an executrix anything more than a covenant against her own acts, but if she contracts to give a covenant of warranty, and actually executes it, the covenant will be valid and she will be bound thereby.

Held, further, that, the objection that her testator's indebtedness for the judgment, was an incumbrance and lien on the property for which it could be sold by creditors at any time within three years from November 7, 1877, to pay his debts is fatal to the action for specific performance.

The power of sale in the will is not expressly for the purpose of paying debts and legacies. It does not even sanction the conversion of the real estate into personalty. It authorizes the executrix to reinvest the proceeds of the real estate at her pleasure and in her discretion; provided, however, that said proceeds, whatever the form they may assume, shall always remain realty, thus specially withholding the character of a personal fund accessible to creditors. Such proceeds could be followed only in equity, and, under the circumstances, it would seem that no bar or hindrance would exist to a creditor's application for a resale of the premises.

Equity will not aid an effort to impair or destroy the legal remedies of creditors or sanction an attempt on the part of an executrix to vest individually in herself and mingle with her own property, real estate which, until her testator's debts are paid, is chargeable with a trust.

Equity Term, May, 1880.

THIS action was brought for the specific performance of a contract between the parties above named, dated February 11, 1880, for the sale and exchange of certain real estate in the city of New York. The defendant agreed to sell and convey to the plaintiff the house and lot known as 413 West Fiftieth street in said city, for the sum of \$16,000, subject to a mortgage of \$6,000. The plaintiff individually agreed to pay for

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said premises by giving warranty deed of premises known as No. 437 West Thirty-ninth street, in said contract valued at \$12,000, subject to a mortgage of \$7,000, and also premises known as 412 West Fortieth street, valued at \$10,000, subject to a mortgage of \$5,000.

The contract was made and signed by the plaintiff in her individual name, and the deeds of the premises above referred to were to be delivered on or before March 1, 1880, the time for the completion of said contract, which was extended by mutual consent in writing until March 13, 1880. On the day last named plaintiff tendered to defendant a warranty deed of the premises 437 West Thirty-ninth street and also a deed executed by her as executrix as aforesaid of premises No. 412 West Fortieth street, which deeds defendant refused to accept for reasons hereinafter stated. Immediately thereafter the plaintiff executed individually and as executrix as aforesaid a warranty deed of premises number 412 West Fortieth street, containing full personal covenants on her part and tendered the same to defendant which he also refused to accept.

It appears from admissions made upon the trial and the testimony, that the plaintiff was the owner in fee of the premises 437 West Thirty-ninth street, and assumed to convey the premises 412 West Fortieth street as executrix under the will of John M. Mayer. In said will, dated August 6, 1872, and admitted to probate by the surrogate of the county of New York, November 7, 1877, the testator first directs the payment of his debts and then devises the premises last named to his wife, the plaintiff, for life or during widowhood. Upon her death or remarriage the said premises were devised in fee to his surviving children or their issue. Full power was given to the plaintiff as such executrix at any time and on such terms as she might think satisfactory, to sell, mortgage or lease the whole or any part of the testator's real estate and to invest the proceeds of such sale in good and safe securities or purchase other real estate, to sell the said securities and real estate so secured or purchased and to continue the said transfer or dis-

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position of the real estate of said testator or the proceeds thereof as long, and to repeat the said operations as often, a said executrix might think best and proper; provided, however, that the proceeds of such sale or other disposition of said real estate shall be considered real estate.

It further appears that on May 6, 1878, a judgment was recorded against the plaintiff as executrix as aforesaid, for the sum of \$5,540.59 in an action commenced against the said John M. Mayer, deceased, in his lifetime, in whose place and stead the said executrix was substituted as defendant *pendente lite*.

It was conceded on the trial that this judgment is still unpaid, and that the personal property of the deceased in the hands of said executrix does not exceed the sum of \$150.

LARREMORE, J.—Defendant objects to the title on the following grounds:

I. That the plaintiff had no power to exchange the Fortieth street property.

II. That she could not give a warranty deed, or sell the property in fee simple as she contracted to do.

III. That her testator's indebtedness for the \$5,540.59 was an incumbrance and lien on the property for which it could be sold by creditors at any time within three years from November 7, 1877, to pay his debts.

First. As to the power to exchange. This objection is fully answered by the terms of the will. The testator gives plaintiff a life estate in the premises No. 412 West Fortieth street, or the proceeds thereof. He, in express terms, impresses the character of realty upon said proceeds during the natural life or widowhood of plaintiff, through all the transitions and changes of form which they may undergo. The power is expressly conferred to sell and with the proceeds purchase other real estate, and to continue the transfer and disposition thereof in the discretion of the executrix. It would seem a fair and rational construction of a power as broad in its terms as the one above stated, to hold that it

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would authorize a direct exchange which would accomplish the result of a sale and a purchase of other realty in a single transaction, and carry into effect the obvious intention of the testator. If, therefore, this was a simple question of exchange not complicated by other considerations, I should hold the objection untenable.

Second. Equally ineffectual is defendant's objection that plaintiff cannot give a warranty deed or sell the property in fee simple. She could certainly give a valid title under the power in the will, and, if she saw fit, could give her personal warranty of the title. A purchaser has no right to expect from an executrix any thing more than a covenant against her own acts; but, if she contracts to give a covenant of warranty and actually executes it, the covenant will be valid and she will be bound thereby.

Rawle on Covenants for Title (*pages 571 and 572, and cases there cited*). In this case the plaintiff tendered the usual deed of an executrix on March 13, 1880. This defendant refused to accept and plaintiff thereafter executed a deed individually and as executrix, containing a personal covenant of warranty and tendered the same to defendant. This latter instrument fulfilled the requirements of the contract on this point. The interval of a day or two between the tender of the two deeds last mentioned and the consequent delay in the execution of the contract were immaterial. Time not being of the essence of the contract, and not having been made so by the acts of the parties, the subsequent tender of the warranty deed was sufficient compliance with the terms of the contract as to the time of its performance (*Myers agt. De Mier, 4 Daly, 343; affirmed, 52 N. Y., 647*).

Third. The consideration of the third objection leads to the discussion of matters of graver significance. The judgment for \$5,540.59 having been recovered and docketed, not against the deceased during his life, but against his executrix, is not a specific lien against the testator's real estate (*Sharpe agt. Freeman, 45 N. Y., 806*).

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Nevertheless, I am not prepared to hold that if specific performances were compelled in this action, the defendant would take the premises in West Fortieth street discharged from all claim and demand on account of said debt. The statute of this state provides that at any time after the accounting of an executor or administrator and within three years after the granting of letters testamentary or of administration, if it shall appear that there are not assets sufficient to pay the debts of the deceased, any creditor may apply to the surrogate to compel the executor or administrator to mortgage, lease or sell the real estate of the deceased to pay said debts (3 *Rev. Stat.*, page 117, sec. 60, 6th edition).

It is also provided (3 *Rev. Stat.*, page 120, sec. 75, 6th edition), that where by any last will a sale of real estate shall be ordered to be made either for the payment of debts or legacies, the surrogate in whose office such will was proved shall have power to cite the executors to account for the proceeds of the sale and make distribution thereof, and have all powers in respect to said proceeds as if the same had been originally personal property.

The provision last cited affords a convenient and inexpensive substitute for the proceeding first referred to. The statute does not, in express terms, make a sale by executors under such a power an absolute bar to a creditor's proceedings; but if the power had been exercised and proceeds realized which could be brought under the surrogate's control, it would be just and reasonable to conclude that the statutes above set forth should be construed in connection, and as supplementary the one of the other, and refuse the application of a creditor for a resale. But the case at bar is widely different from the one contemplated by the statute. The power of sale in the will is not expressly for the purpose of paying debts and legacies. It does not even sanction the conversion of the real estate into personalty. It authorizes the executrix to reinvest the proceeds of the real estate at her pleasure and in her discretion; provided, however, that said proceeds, whatever the form

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they may assume, shall always remain réalty, thus specially withholding from them the character of a personal fund accessible to creditors.

Said proceeds in the new form contemplated by the contract, sought to be enforced herein, could be followed only in equity, and under the circumstances I cannot see that any bar or hindrance would exist to a creditor's application for a resale of the premises.

Furthermore, this is a proceeding on the part of plaintiff which equity cannot lend itself to further or enforce. Granting that plaintiff is empowered by the will to exchange the réalty for other réalty, it is at least questionable whether she is authorized to mingle property in which she has but a life interest with property owned by her in fee, and whether this in itself would not unwarrantably imperil the rights of remainder-men. But beyond this, in her trust capacity as executrix, the law and good conscience alike require her to apply first the personal estate, and, after that is exhausted, the real estate of the deceased to the payment of his debts. It is conceded that the personal estate of the testator in her hands does not exceed \$150, and that a judgment has been recovered against her, as executrix, as aforesaid for \$5,540.59, which is unsatisfied. If the property should be exchanged as provided for in the contract, the newly-acquired réalty would not be the "real estate of the deceased," and, therefore, could not be reached by the statutory surrogate's proceedings. Equity will not aid an effort to impair or destroy the legal remedies of creditors, or sanction an attempt on the part of an executrix to vest individually in herself and mingle with her own property, real estate, which, until her testator's debts are paid, is chargeable with a trust.

Defendant is entitled to a decree for dismissal of the complaint, and for judgment against plaintiff individually for his reasonable costs and disbursements in the transaction, to be determined by a reference unless agreed upon, but without costs of this action.

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COURT OF APPEALS.

RICHARD FIELD agt. JOHN B. BLAND and another.

Sale and delivery of chattels—Election of remedies—Confession of judgment—Evidence.

Where, after the goods had gone into the possession of the defendant, the plaintiff accepted from her a confession of judgment for the whole value thereof, and after the facts now alleged to show conversion of the property were known to him, he issued an execution for its enforcement and collected a part thereof:

Held, that plaintiff, by accepting the judgment and taking out and enforcing his execution, must be deemed to have made his election to treat the goods as the property of the defendant under a sale by himself, and he cannot afterwards change his ground to that of wrongful taking and conversion.

May, 1880.

THIS was a motion to vacate an order of arrest, issued on affidavits alleging that plaintiff, in October, 1878, delivered a quantity of goods consisting of pistols, opera glasses, jewelry, musical and mathematical instruments, &c., to the defendant's wife, to sell at her store on commission; that she, about April, 1879, with her husband's assistance, packed up and stored her goods, without plaintiff's knowledge or consent, and refused to return them on demand.

Defendant moved on affidavits alleging that the defendant's wife purchased the goods outright, as was evidenced by bills delivered at the time the goods were delivered; and further alleging that after the goods were delivered, defendant's wife confessed a judgment for \$3,000, the value, at plaintiff's request, on which confession judgment was entered on December 24, 1878; and that on the afternoon of April 26, 1879, after knowing of the breaking up of the store and all the facts relied on to show the alleged conversion, the plaintiff

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issued execution and collected over \$400 on the judgment. The defendant claimed the confession of judgment was conclusive evidence that the transaction was a sale and delivery of goods, and that in any event the issuing of an execution with knowledge of all the facts alleged to show a conversion, was an election of plaintiff's remedy, and this action could not be maintained.

Plaintiff claimed the judgment was only intended as a collateral security. Justice LAWRENCE denied a motion to vacate the order of arrest, and on appeal the general term affirmed the order. On appeal to the court of appeals the order was reversed, with costs, the following being the opinion "*in extenso*:"

M. M. Budlong, for appellant.

A. Kling, for respondent.

DANFORTH, J.— The order for the arrest of John B. Bland, one of the defendants, was granted upon the ground that the defendants had wrongfully taken and converted certain personal property of the plaintiff. The affidavits on which the order was granted, were to the effect that the goods had been intrusted to Susan Bland, upon her agreement that she, with the aid of her husband, John B. Bland, would sell them for the plaintiff and account for the proceeds; that instead of doing so, they had secreted and taken them away.

A case was made out authorizing the order, and although upon the motion to vacate it, the facts on which it rested were denied, we should find in such denial no ground for interfering except for the circumstance next to be considered. After the goods had gone into the possession of the defendant, Susan, and on the 28th of December, 1878, the plaintiff accepted from her a confession of judgment for the whole value thereof and after the facts now alleged to show conversion of the property were known to him, and on the 26th day of April,

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1879, he issued an execution for its enforcement and collected about \$400, part thereof.

The statement upon which the judgment was entered, described the property now in question, declares that it was "sold and delivered" to the defendant, Susan, and that for its value \$3,000, she is indebted to the plaintiff. It is true that the plaintiff in opposing this action declares that the judgment was taken as security merely. But this is not only in direct opposition to the statement, but the judgment has been, as before observed, enforced by him to some extent, and no proceedings have been taken to amend or correct the statement upon which the judgment was entered. Under these circumstances I think it should be held conclusive against the plaintiff as to the fact in issue; otherwise a means would be provided by which the statute (*Code of Civil Procedure, tit. 11, secs. 1273, 1274*), permitting judgments to be taken by confession could be easily evaded and a door opened to the perpetration of the grossest frauds.

The plaintiff, by accepting the judgment and taking out and enforcing his execution, must be deemed to have made his election to treat the goods as the property of the defendant, under a sale by himself (*Morris agt. Rexford, 18 N. Y., 557; Bank of Beloit agt. Beale, 34, N. Y., 477*), and he cannot now change his ground.

The order appealed from should be reversed and motion to vacate the order of arrest granted, with costs.

All concur.

Foxell agt. Fletcher.

SUPREME COURT.

JOSEPH FOXELL and THOMAS JONES agt. GEORGE W. FLETCHER.

Agreement — to extend time for payment of a debt owing by plaintiff and to accept monthly payments — effect of.

Defendant being indebted to plaintiffs in the sum of \$956.28, one A. conveyed to the plaintiffs a plot of ground "as collateral security for said indebtedness." On the day of the conveyance the plaintiffs signed a written memorandum which recited: "Whereas, George W. Fletcher is indebted to us in the sum of \$956.28, and is at present unable to pay the same; and, whereas, we have agreed to give Fletcher time to pay the same, not exceeding thirty-eight months from the date thereof, and that we will accept monthly payments of not less than twenty-five dollars a month to be paid on the first of each and every month until the whole amount be paid, with interest thereon from July 1, 1876;" and, also, the giving of the deed by A. as collateral security for the indebtedness as before mentioned, and then obligated the plaintiffs to reconvey the property conveyed, when the debt due from Fletcher was "paid in accordance to the terms of the above agreement:"

Held, that no part of the debt became due before the expiration of thirty-eight months.

A promise on the one side to accept, and on the other to pay, a given sum in composition of a debt in installments, is a single agreement to pay a specified sum in installments, and upon a failure to make one payment the whole contract is broken by the debtor, and the creditor can again enforce the original debt.

But where, as in this case, time is given for the whole debt, and there is no promise to pay in installments, but only a declaration by the plaintiffs that they will accept monthly payments if the defendant sees fit to make them, until the defendant fails to pay according to the terms of the agreement, the plaintiffs have no cause of action which they can enforce.

Rensselaer Circuit, November, 1879.

Henry A. Merritt, for plaintiffs.

J. Stewart Ross, for defendant.

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WESTBROOK, J. — The facts in this cause were admitted, and are these :

The defendant was indebted to the plaintiffs in the sum of \$956.28. On the 5th day of January, 1877, one Joseph R. Andrews conveyed to the plaintiffs a plot of ground in Newark, New Jersey, "as collateral security for said indebtedness." The plaintiffs on that day signed a written memorandum, which recited: "Whereas, George W. Fletcher is indebted to us in the sum of \$956.28, and is at present unable to pay the same; and, whereas, we have agreed to give Fletcher time to pay the same, not exceeding thirty-eight months from the date thereof, and that we will accept monthly payments of not less than twenty-five dollars a month to be paid on the first of each and every month until the whole amount of \$956.28 be paid, with interest thereon from July 1, 1876;" and, also, the giving of the deed by Andrews as collateral security for the indebtedness as before mentioned, and then obligated the plaintiffs to reconvey the property conveyed when the debt due from Fletcher was "paid in accordance with the terms of the above agreement."

The case depends upon the terms of the writing and the question is, did any part of the debt become due before the expiration of thirty-eight months, the action having been commenced after the defendant had failed to meet one or two of the monthly payments?

It is true that the writing produced, which is executed by the defendants, is not a direct agreement with the defendant giving time but it expressly declares: "We have *agreed* to give Fletcher time to pay the same," and it must be assumed that the contract between plaintiffs and defendant was in such form and shape that it accomplished what the plaintiffs declare it had done. The language is: "*We have agreed*," and that would be impossible of a verbal talk in which a promise is made of something to be done within thirty-eight months, for such *promise* would be void and would be no *agreement*.

Neither is the criticism sound that the agreement was with

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Andrews. It is true that the writing produced protects Andrews, but therein it is declared that they have agreed with the defendant and the terms thereof are specified. What are those terms?

First. That Fletcher should have time to pay the debt, for it is so stated in direct terms: "We have agreed to give Fletcher time to pay the same."

Second. The limit of the time he was to have is said to be "not exceeding thirty-eight months from the date thereof."

Third. The plaintiffs agree to "accept monthly payments of not less than twenty-five dollars a month, to be paid on the first of each and every month until the whole amount of \$956.28 be paid, with interest thereon from July 1, 1876."

It is not seen how the plaintiffs can avoid the effect of this plain agreement. Time was given to pay, which time could not exceed thirty-eight months from the date of the agreement, with a promise on the part of the plaintiffs to accept monthly payments of not less than twenty-five dollars each; but no promise on the part of the defendant to pay monthly is made, nor is there any reservation by the plaintiffs that a failure to make the monthly payments would render the whole sum due.

The cases cited by the plaintiffs' counsel are not analogous. A promise on the one side to accept, and on the other to pay, a given sum in composition of a debt in installments is a single agreement to pay a specified sum in installments, and upon a failure to make one payment the whole contract is broken by the debtor and the creditor can again enforce the original debt. In this case time is given for the whole debt, and there is no promise to pay in installments but only a declaration by the plaintiffs that they will accept monthly payments if the defendant sees fit to make them. Until the defendant fails to pay, according to the terms of the agreement the plaintiffs have no cause of action which they can enforce.

There must be judgment for the defendant upon the sole

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ground that there was no debt due to the plaintiffs when this suit was commenced. As an action is commenced, except to save the statute of limitation, by the service of the summons, the plaintiffs could serve the summons issued to the sheriff prior to the agreement giving time, after default, if any in the agreement. They were not compelled to issue new process to begin the suit, though the order of arrest issued, but not executed, before such agreement became invalid in consequence thereof, as the general term held upon the appeal from the order refusing to vacate it. As the case is decided upon the ground that the time given to pay the debt had not expired when the summons was served, there is no occasion to elaborately discuss the point made upon the summons, and the alleged necessity of issuing a new one.

NEW YORK SUPREME COURT.

WILLEMINF L. L. REINERS agt. FREDERICK BRANDHORST
and others.

Demurrer to complaint.

A subsequent separate cause of action cannot be upheld by allegations contained in a preceding one unless they are connected therewith by proper averments.

Victory Webb, &c., Manufacturing Company agt. Beecher (55 How. P. R., 193) applied.

Where a plaintiff, in her complaint, averred that she "*is the only heir at law of the deceased,*" and as such is entitled to certain property of the deceased, but it was not alleged that the deceased died intestate, or what issue, if any, he left him surviving, or how her claim as sole heir at law arose:

Held, on demurrer, that the averment was a conclusion of law and not the allegation of a fact, and that, for such reason, the complaint was defective in substance.

Special Term, October, 1879.

Reiners agt. Brandhorst.

J. H. Whitelegge, for demurrer.

A. M. & G. Card, opposed.

VAN VORST, *J.* — The plaintiff, in her first cause of action, alleges that on or about the 28th day of December, 1875, one Henry A. Henken died in the city of New York leaving certain real estate. She further "alleges, on information and belief, that she, according to the laws of New York, is the only heir at law of the said deceased," and was, "as such heir at law," on the death of Henken, entitled to the property and the rents, issues and profits thereof. In the first cause of action the complaint alleges that two of the defendants have taken possession of the property and converted it to their own use.

In the second cause of action it is claimed that two of the defendants, other than those mentioned in the first cause of action, have received portions of the proceeds of this property realized on a sale thereof, they claiming to be heirs at law of the deceased. The plaintiff, however, alleges that such defendants are not the heirs at law of the deceased. It is these latter defendants who have demurred to the complaint, upon the ground that the same does not state facts sufficient to create a cause of action in plaintiff's favor.

If the complaint be regarded as in fact attempting to set up different causes of action, as it purports by its language to do, then the second cause is defective in not setting up the facts out of which the plaintiff's right to relief arises.

Each separate cause of action must be complete in itself and contain everything that is essential to be stated to show the plaintiff's right to relief (*Victory Webb, &c., Manufacturing Co. agt. Beecher*, 55 *How. P. R.*, 193; *Anderson agt. Speers*, 58 *How. P. R.*, 68).

A subsequent separate cause of action cannot be upheld by allegations contained in a preceding one unless they are connected therewith by proper averments. But whether the

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complaint be regarded as setting up two or only one cause of action it is defective in substance.

The plaintiff says that she "is the only heir at law of the deceased," and as such is entitled to the property and the rents thereof. It is not stated that the deceased died intestate, or what issue, if any, he left him surviving, nor how her claim as sole heir at law arises.

An averment that one is the sole heir at law, under the laws of New York, of a deceased person is a conclusion of law and not a fact. The facts, out of which such claim arises, should be stated in a pleading, and the heir at law cannot claim unless there was no valid testamentary disposition made by the deceased, in which case the fact of intestacy should be pleaded.

The demurrers are well taken, and there must be judgment for defendants with leave to plaintiff to amend, on terms.

N. Y. COMMON PLEAS.

WILLIAM H. CROMWELL *et al.*, plaintiffs and appellants, agt.
GEORGE L. BURR, defendant and respondent.

Discharge in bankruptcy and by composition proceedings — Pleadings.

A discharge in bankruptcy may be pleaded by a simple averment, that on the day of its date it was granted to the bankrupt, setting forth a copy thereof. In such a case it is not necessary for the defendant to allege the facts which show that the court of bankruptcy had jurisdiction of the party or of the subject-matter.

All other proceedings which are relied upon to discharge a bankrupt from his debts must, when pleaded, be accompanied by averments which show that the court in which they were taken had jurisdiction of the parties and of the subject-matter. Such proceedings are regarded as the judgment of an inferior court of special and limited jurisdiction, or as a discharge in insolvency, and jurisdiction must be shown by the averment of facts which conferred it.

Decided, May Term, 1880.

Cromwell *et al.* agt. Burr.

APPEAL from a judgment of affirmance by the marine court general term.

Wilder & Thomas, for plaintiffs and appellants.

Wakeman & Latting, for defendant and respondent.

VAN HOESEN, *J.* — Section 5119, Revised Statutes of the United States, provides that a discharge in bankruptcy may be pleaded by a simple averment, that on the day of its date it was granted to the bankrupt, setting forth a full copy of the discharge in its terms as a full and complete bar to all suits brought on any debts, claims, liabilities or demands which were, or might have been, proved against the estate of the bankrupt in bankruptcy. Where a discharge is set forth in the answer, that is to say, where a full and complete copy thereof is inserted in the pleading it is not necessary for the defendant to allege the facts which show that the court of bankruptcy had jurisdiction of the party or of the subject-matter (*Stoll* agt. *Wilson*, 14 *W. B. R.*, 571; *Estee's Form and Precedents*, title, "*Bankruptcy*").

Sackett agt. *Andress* (5 *Hill*, 327), and other cases which hold that the pleading must set forth the facts which show the bankruptcy court to have had jurisdiction, were decided under a statute which contained no such provision as section 5119, to which reference has been made.

But that section applies to discharges only. All other proceedings which are relied on to release a bankrupt from his debts must, when pleaded, be accompanied by averments which show that the court in which they were taken had jurisdiction of the parties and of the subject-matter. Such proceedings are regarded as the judgment of an inferior court of special and limited jurisdiction, and must be shown by the averment of the facts which conferred it (*Turner* agt. *Roby*, 3 *N. Y.*, 193; *Sackett* agt. *Andress*, 5 *Hill*, 327; *Stoll* agt. *Wilson*, 14 *W. B. R.*, 571).

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The answer in this case is defective in substance, as it does not set forth facts which gave the court of bankruptcy jurisdiction of the bankrupt, and of the involuntary proceedings taken by the creditor against him. It was error, therefore, in the justice to deny the plaintiff's motion for judgment on the answer. Had the justice decided the answer to be defective, it would have been proper to allow the defendant to amend his answer by pleading the jurisdictional facts; but, as the plaintiff delayed his motion till the trial had begun, there should not be imposed, as condition of such an amendment, any more costs than he would have been entitled to if he had moved for judgment upon the answer as frivolous, under section 537, Code of Civil Procedure. For the error in denying the motion for judgment on the answer, the judgment must be reversed, with costs to abide the event. As the defendant will doubtless at once apply for leave to amend his answer, it may be well to call attention to the following authorities which both parties may find useful (*Stephens* agt. *Ely*, 6 *Hill*, 607; *Ex parte Jewett*, 11 *W. B. R.*, 443, 444; *In re Duncan*, 14 *W. B. R.*, 18; *In re Funkenstein*, 14 *W. B. R.*, 213).

The *Stephens* case establishes that it is not necessary for a bankrupt, against whom proceedings in involuntary bankruptcy were taken, to set forth, when pleading a discharge, what the acts of bankruptcy were of which he was accused by his creditors. The other cases hold that where the jurisdictional facts are shown to exist, viz., that the debtor resides within the United States, and either resides or does business in the district in which bankruptcy proceedings are taken, and that he owes debts provable in bankruptcy to an amount exceeding \$300, the court of bankruptcy has jurisdiction, and its decisions cannot be inquired into or impeached collaterally because the requisite number of creditors did not unite in the petition or because the petition does not contain sufficient allegations of the existence of any of the facts which, under section 5021, United States Revised Statutes, should exist to warrant a proceeding in involuntary bankruptcy. Nor would it invalidate

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a composition resolution, accepting which the court had ordered to be recorded, if the creditor should prove in a collateral action that the requisite number of creditors had not, in fact, accepted the composition. The court of bankruptcy, in ordering the resolutions to be recorded, necessarily decided that the requisite number had accepted, and its decision cannot be questioned collaterally. Nor would the failure to produce the bankrupt's statement at any meeting, or any other omission, or any departure by the bankruptcy court from the regular order of procedure invalidate the composition when pleaded as a defense to a collateral action. If the court of bankruptcy had jurisdiction of the proceedings when they were begun its adjudication in favor of recording the resolutions accepting the composition, is conclusive as to the regularity of every intermediate proceeding.

We do not now intimate any opinion as to the effect of the omission from the petition of any allegation as to the residence of the bankrupt. The Revised Statutes do not prescribe what the petition shall allege. Whether the petition was sufficient to confer jurisdiction, it not averring that Burr resided within the United States, we leave for future consideration. Nor do we now express any opinion as to the effect of an offer of money in fulfillment of the terms of the composition, coupled with a demand for a receipt, and a refusal to pay the money unless a receipt were given. We do not determine whether a tender with a condition annexed is such a tender as will debar the creditor from claiming the full amount of his original claim.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

C. P. DALY, Ch. J. and J. F. DALY, J., concurred.

Kernochan agt. Bland.

N. Y. MARINE COURT.

JAMES P. KERNOCHAN, as trustee, and another agt. JOHN B. BLAND and another.

Joint debtors — proceedings against — Parties not summoned in action on joint contract may be summoned after judgment — Code of Procedure, sections 375-379 — Time of service, twenty days.

The proceeding provided for by section 375 of the Code of Procedure to bind a joint debtor not originally summoned is a special statutory proceeding, and a party defendant is entitled to twenty days' notice, and this although the suit be in the marine court.

Special Term, May, 1880.

W. H. Sage, for plaintiff.

M. M. Budlong, for defendant.

THIS was a motion to vacate a judgment. It appeared that on May 14, 1879, judgment had been entered herein for \$220.42 against one of the defendants. On March 8, 1880, the defendant, John B. Bland, who was never served with the original summons, was served, under the provisions of section 375 of the old Code, with a summons to show cause within six days why he should not be bound by the judgment as a joint debtor. On March 16, 1880, judgment was entered against him for \$261.51, he having taken no notice of the summons. Execution was thereupon issued to the sheriff who having returned the same unsatisfied, an order for the examination of the defendant, John B. Bland, was obtained and served. He then made this motion to vacate and set aside the judgment entered against him on March sixteenth, and the execution and order on the ground that the summons required him to show cause within six days instead of twenty.

Matter of Isidor and Hein.

Plaintiff's attorney claiming that the summons in this court being returnable in six days the practice was regular, while the defendant's attorney claimed that this was a statutory proceeding to bind a joint debtor and must be strictly pursued.

SHEA, *Ch. J.*—The judgment entered by notice, under the sections 375 and 379, against the joint debtor not served with the original summons is irregular; that proceeding is special and the party defendant is entitled to twenty days' notice. The auxiliary judgment must, therefore, be vacated as to him.

No costs awarded it being a new point of practice.

N. Y. COMMON PLEAS.

In the Matter of the Assignment of MORITZ ISIDOR and FERDINAND HEIN to EDWARD STREGLITZ for the benefit of creditors.

Assignment—Examination and inspection of books and papers of assignors—when and to what extent such examination will be ordered.

The creditors have an absolute right to examine into the affairs of the assignors, and for that purpose to inspect their books.

The inspection need not be made by the creditor personally. He may designate some one to make it for him, and it cannot be an objection that the person so designated is an *expert*.

General Term, May, 1880.

On the 22d November, 1879, judge LARREMORE granted an order for the examination of the assignors and assignees and of books and papers upon the petition of numerous creditors whose claims amount to \$13,778.15, as verified on the same day, which alleged:

1. A due demand for an inspection of said books, &c.
2. Refusal by the assignee.

Matter of Isidor and Hein.

3. Under advice of his counsel.

4. Because information might be obtained inconvenient to the assignee and assignment.

5. The debts are \$133,732.74, of which \$56,394.20 are preferred.

6. The assignee preferred for \$17, 572 92, and M. L. Streglitz & Sons, his relatives,

for..... 23, 606 28

Together amounting to .. \$41, 179 20

Upon the affidavit of the assignee and his counsel, and on his motion, the order of Mr. justice LARREMORE was, on the 29th day of November, 1879, modified by him, and it is from this order that the present appeal is taken.

There is no substantial variance between the order entered and now appealed from and the order proposed by the assignee.

The order appealed from is as follows:

Upon the petition of Frederick Butterfield and other creditors of said assignors the order made thereon on the 22d day of November, 1879, the notice of motion in behalf of said assignee to modify said order and the affidavits of Siegmund Spingarn and Edward Streglitz in support of such motion, and after hearing Siegmund Spingarn, Esq., of counsel for said assignee, in support of said motion, and Mr. Richard S. Newcombe, of counsel for said petitioning creditors consenting thereto, and proposing this order in lieu of said order of the 22d November, 1879, it is

Ordered that said order of the 22d day of November, 1879, be modified, and in the place and stead thereof it is

Ordered that the petitioning creditors by Frederick Lewis, their agent, have leave to examine the books of account of said assignors before William S. Keiley, Esq., counselor at law, who is hereby appointed referee for the purpose of such inspection being had before him, and for that purpose the

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said assignee is hereby directed and required, upon two days' notice, to produce before said referee said books, together with all vouchers and papers connected with the affairs of said assignors which may be necessary for the purpose of such examination, and that such books and vouchers shall be produced for such purpose from time to time until the completion of such examination, and that said Frederick Lewis may make such extracts therefrom as he may desire.

And it is further ordered that said assignors and assignee, and such other person or persons as may be necessary, be and appear before said referee upon such days as he may designate to be then and there examined touching such books and accounts and other matters connected therewith as may seem necessary.

COURT OF COMMON PLEAS**IN AND FOR THE CITY AND COUNTY OF NEW YORK.**

IN THE MATTER OF THE ASSIGNMENT OF MORITZ ISIDOR AND FERDINAND HEIN.

SIR. — Please take notice that Edward Streglitz, the assignee in the above-entitled matter, hereby appeals to the general term of this court from an order entered herein on the 29th day of November, 1879, requiring the production of the books of the firm of Isidor & Hein before William S. Keiley, Esq., referee, for the purposes of inspection, and he hereby appeals from each and every part of said order.

Dated NEW YORK, *December* 10, 1879.

LAUTERBACH & SPINGARN,

Attorneys for the Assignee.

To NATHANIEL JARVIS, JR., Esq.,

Clerk of Court of Common Pleas.

To RICHARD S. NEWCOMBE, Esq.,

Attorney.

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S. Spingarn, for appellant. The court had no right to grant the order in the manner and form in which it was entered.

The jurisdiction of the court to order the examination of the books is contained in section No. 1 of the general assignment act of 1877, which is as follows :

“The county judge may also, at any time, on petition of any party interested, order the examination of witnesses and the production of any books and papers by any party a witness before him or before a referee appointed by him for such purposes.”

The appellant contends that under this section the court can only direct a party or witness to produce the books while such party or witness is under examination, and that such books remain in the custody of the party or witness until the examination is concluded when, in pursuance of said section, they may be directed to be filed in the clerk's office.

The evident intent of the section is to afford a creditor the right to examine the affairs of the debtor, at the same time affording the debtor an opportunity for explanation which an oral examination affords.

As the order is entered it affords the creditor an opportunity for an examination of the books without giving the debtor an equal opportunity for explanation.

The question is novel and the practice has not been adjudicated at a general term of this court. It is conceded that the opportunity for an examination of books can be accorded to a creditor upon a proper petition, but it is claimed that the provisions of this section authorize no different procedure than the ordinary ones where the books of an adverse party are obtained for purposes of examination.

It cannot be claimed that a party obtaining books under a subpoena *duces tecum* would have the right to examine the books of the opposing party without direct questions to the witness producing the books.

Even when a discovery is directed and books and papers

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are ordered to be produced for inspection it is done under circumscribed limitations, and the subject-matter sought to be discovered is well defined and the inspection limited accordingly.

As the order now stands there is no limit to the petitioner's right, and he can examine each and every paper and book which the debtors ever used in their business without giving the debtors an opportunity to explain any apparent discrepancies or correct inadvertent errors or mistakes, and the result might be long litigations based upon apparent abstracts from books and papers on their face showing irregularities but capable of rectification and ready explanation by an oral examination.

The power to examine books and papers is an invasion of the rights of an individual, and when allowed in pursuance of law the provisions and safeguards of law should all be observed so as to prevent oppression and injustice.

Richard S. Newcombe, for respondent.

I. The petition of the creditors was presented under section 21 of the assignment act, which provides that on the petition of any party interested the county judge may order the examination of witnesses and the production of any books and papers by any party or witness before him, or before a referee appointed by him for such purpose. The order appealed from only so provides.

The affidavit of the assignee, it is true, denies the allegation in the creditors' petition as his reason for permitting an examination of the books; but that statement, though contradicted, read with the fact of preferences having been created to the amount of \$41,179.20 in favor of the assignee Streglitz and M. L. Streglitz & Sons was sufficient to justify the order appealed from.

II. Irrespective of the reason assigned it is plain that the assignee refused to allow the books to be examined. He don't deny the refusal, he only says he didn't put it on the

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ground alleged in the moving papers. He says, in effect, that he took the ground that the creditors had no right to have the books examined by an expert, but that he would give any information in regard to a specific matter. That is not what the creditors want, nor what they have the right under the statute to have. They want to examine into the affairs of the assignors. This they have the right to do fully and unrestrictedly, and it is a breach of duty upon the part of the assignee to prevent their doing it (*Manning agt. Stern*, 1 *Abb. N. C.*, 408).

III. The creditors have an absolute right to examine into the affairs of the assignors, and for that purpose to inspect their books (*In re Bryce & Smith*, 56 *How. P. R.*, 359). The inspection need not be made by the creditor personally. He may designate some one to make it for him, and it cannot be an objection that the person is an *expert*.

IV. It is utterly unreasonable for an assignee to refuse a creditor free right to examine into the affairs of the debtor. The assignee is not appointed to protect the debtor or to baffle the creditor. The least a failed debtor can do is to throw open his affairs to the examination of his creditors. If he cannot pay his debts he should at least be willing to let the creditor know why and how the misfortune occurred and what has become of his property; and an assignee who obstructs, or attempts to obstruct, by refusing to allow the creditors the fullest access to the books of the debtor, is recreant to his duty and to the trust in favor of the creditors which has been conferred upon him. The order should be affirmed, with costs.

After argument the general term, VAN BRUNT and J. F. DALY, JJ., affirmed the order of LARREMORE, J.

Dodge agt. The Bradstreet Company.

SUPREME COURT.

JOHN A. DODGE agt. THE BRADSTREET COMPANY, JOHN H. WHITE and ROBERT B. HARDY.

Action against a corporation for conspiring with others to injure the defendant by slanderous utterances — Complaint.

Where, in an action against a corporation defendant sued with others, it is alleged in the complaint that the corporation combined and confederated with the other defendants to injure the plaintiff by circulating false and slanderous statements to his injury with the view of compelling him to become a subscriber to the publications of the corporation defendants, in pursuance of which combination the slanderous words were uttered by the other defendants:

Held, upon demurrer to the complaint, that a cause of action was alleged against the corporation.

Special Term, April, 1880.

DEMURRER to the complaint.

John H. Bird, for defendants.

Clarence Lexow, for plaintiff.

VAN VORST, J. — After a careful reading of the complaint and a consideration of the points and arguments of the counsel I cannot conclude that this pleading is obnoxious to the objection that causes of action have been improperly joined.

It does not appear to have been the pleader's intention to interpose two separate causes of action, one for slander and another for an illegal combination and conspiracy between the defendants to injure the plaintiff.

It is true that the utterances of the defendants, White and Hardy, which are claimed to have been false and slanderous, are given with detail in the beginning of the complaint, but

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they are afterwards alleged to have been the outcome of an illegal conspiracy and combination formed between the defendants with the intent and design of compelling plaintiff to become a subscriber to the publications of the defendant corporation. As far as the value of the pleading is concerned it is immaterial whether the conspiracy which conceived the wrong and consummated it in averment precedes or follows the statement of its open expression.

The complaint undertakes to state only the history and nature of a combined purpose to do plaintiff an injury, and the method of its accomplishment.

It is not necessary to question the point made by the learned counsel of the defendant that a corporation could not utter a slander (*Townsend on Slander*, sec. 265).

Although it has not the power of human speech it can and unfortunately sometimes does much human mischief. Corporations have the capacity to enter into combinations with others through which wrong is often inflicted.

The illegal and improper purposes of a corporation may find expression in a resolution entered on its books, and its ends may be attained through its agents and confederates.

A corporation may sanction the publication of a libel by its agents and employes and will be held liable therefor.

Corporations have the capacity to act and that, too, with a bad motive. They are managed by fallible men. The defendant corporation is here charged with combining and confederating with the other defendants to injure the plaintiff by circulating false and slanderous statements to his injury.

This may not, in the end, prove to be true, but for the purposes of this hearing the demurrer concedes it. For this action, if established by competent proof, it should be held liable.

Among other things the plaintiff is charged with being a "*defaulter*" under circumstances which impute a crime, and that is actionable.

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The grounds of demurrer are not well taken and there should be judgment for the plaintiff with liberty, however, to the defendant to withdraw the demurrer and interpose an answer on payment of costs.

COURT OF APPEALS.

JAMES E. McVEANY, plaintiff and appellant, agt. THE MAYOR, ALDERMAN AND COMMONALTY OF THE CITY OF NEW YORK, defendants and respondents.

New York (city of) — Election of aldermen — The supreme court — power to determine upon quo warranto whether a person was duly elected or not — Officer de facto and de jure — their rights as to salary.

The provisions of the charter of the city of New York providing that the board of aldermen and assistant aldermen of that city should be the exclusive judges of the qualification, election and return of their members, do not take away from the supreme court its inherent power of determining upon *quo warranto* whether a person was duly elected to and qualified for such office. The power is a concurrent and not an exclusive one, and the jurisdiction of whichever attaches first continues to the termination of the proceeding. Therefore, if the claimant to the office submits himself to the jurisdiction of the board to which he claims to have been elected, and that board decides against his title he cannot afterwards invoke the aid of the court, but if the aid of the court is sought first its judgment is conclusive. A person who receives the certificate of election to an office of which he gets possession ceases to be an officer *de facto* from the time of judgment of ouster. No further proceeding or writ is necessary to put the officer *de jure* into legal possession of the office, and a payment by the financial officer of a municipal corporation to such *de facto* officer, after notice of such judgment of ouster, does not protect the municipality from the payment of the same salary to the officer *de jure* from and after the time of such notice.

Decided February, 1880.

THE plaintiff was elected at the charter election in 1868, an assistant alderman, from the ninth assembly and assistant

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aldermanic district of the city of New York, under the provisions of the amended charter. Although regularly elected by a majority of the votes cast, the returns of the district canvassers were, in two election polls of the district, fraudulently altered, and the vote transposed, so as to elect the plaintiff's competitor, Peter Culkin.

The county canvassers counted the vote as it appeared by the altered returns of the district canvassers, and, of course, declared Culkin elected according to such returns. Culkin was thereupon admitted to a seat in the assistant aldermanic chamber, and McVeany excluded.

The attorney-general thereupon commenced an action in the nature of a *quo warranto*, in the name of the people of the state, on the relation of *McVeany agt. Culkin*, to oust him from said position, on the ground that he usurped the office, and that McVeany, the relator, was entitled to it. After issue joined that action was tried, and judgment rendered ousting Culkin, and declaring McVeany elected and entitled to the position. The plaintiff's official term commenced January 1, 1869, and was to continue one year. The judgment of ouster was rendered June 17, 1869. The plaintiff thereupon took the official oath, and filed it in the mayor's office, and went to the assistant aldermanic chamber, at a regular meeting of the board, with a certified copy of the judgment and demanded his seat; the board refused to permit him to act, although he was, at all times, ready and willing to perform his official duty, and did all in his power to do so. The plaintiff, after the expiration of his official term, brought this action to recover the year's salary belonging to the office, fixed by law at \$4,000. The defendants denied McVeany's election, and, for further defense, contended that the board of assistant aldermen were the exclusive judges of the election of its members, and that the board had declared Culkin elected, which declaration was, as they claimed, conclusive on the plaintiff. The case was tried before justice FANCHER and a jury. The defendants' counsel moved for a nonsuit on

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all the evidence in the case, and the court granted the motion, with a direction that the exceptions be heard in the first instance at general term, and judgment suspended in the meantime. The general term ordered judgment for the defendants on the exceptions (*see case reported in 1 Hun, 35, and in 3 Thompson & Cook, 131*), and from such judgment the plaintiff appealed to the court of appeals.

Edward Jacobs and James Clark, for appellant.

W. C. Whitney and F. L. Stetson, for respondents.

FOLGER, J. — This is an action, brought by the plaintiff, to recover from the defendant the salary, for the year 1869, of the office of assistant alderman for the ninth aldermanic district in the city of New York.

The plaintiff claims that he was duly elected to that office for that year. He gave no parol proof of that fact. He put in evidence a judgment roll in the supreme court in the case of *The People on the relation of James E. McVeany agt. Peter Culkin*. From that it appears that the case was an action in the nature of a *quo warranto* to test the right of Culkin to the office above named. It was adjudged, in that case, that Culkin had usurped and intruded into that office and that he be, and that he thereby was, ousted therefrom. It was also adjudged that McVeany, the plaintiff here, was entitled to that office since the 1st day of January, 1869, and for one year beginning on that day and ending on the last day of December of that year.

The defendants contend that this adjudication is of no effect for that, as they urge, the board of assistant aldermen has the exclusive jurisdiction to judge of the election of its own members. Power to judge is given by the charter of the defendants, and it is claimed that, thereby, the courts are excluded from any jurisdiction in such case, except to review the action of the board after its action has been had. We are

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not of that mind. The same question has been presented to us in the case of *The People ex rel. agt. Hall* (*decided at this sitting*), and we there held that the supreme court was not ousted of jurisdiction in such case by that provision in the charter, and that the power to judge given to the boards of the common council was not exclusive but cumulative only.

We must hold, then, that the judgment thus proven establishes, for the purposes of this case, that McVeany, the plaintiff, was *de jure* the assistant alderman for that district for that year.

It appeared on the trial that McVeany had not in fact held and exercised that office, nor performed any duty or rendered any service in it. It further appeared that at the election held for the office there was given to Culkin the canvassers' certificate that he was elected; that he took the oath of office and discharged the duties of it for that year and received from the defendants, by their comptroller, payment of the official salary for that year. Thus he was *de facto* in the office, as the incumbent thereof, under color of title thereto. It is a fact of some importance, too, that McVeany did not take an oath of office until after that judgment, to wit, on the 18th of June, 1869.

On this state of facts the defendants urge that upon the authority of the cases of *Connor agt. The Mayor* (5 *N. Y.*, 285); *Smith agt. The Mayor* (37 *id.*, 518) the plaintiff cannot recover, for that he rendered no service to the defendants and earned no compensation. In 5 *New York* it is said, per RUGGLES, Ch. J., that "the right to compensation grows out of the rendition of the services and not out of any contract between the government and the officer that the services shall be rendered by him." The same idea is expressed by DANIELS, J., in *Butler agt. Penna.* (10 *How. [U. S.]*, 402-416): "The promised compensation for services actually performed and accepted * * * may undoubtedly be claimed both upon principles of compact and of equity; but to insist beyond this * * *, upon a reward for acts

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neither desired nor performed, would appear to be reconcilable neither with common justice nor common sense." The learned judges in these instances were combating the notion that a right to a public office was private property or held by contract so that it could not be taken away or affected, or the emoluments of it regulated during the term of the incumbent. The cases did not present directly the question whether an officer could, by virtue of his right alone to the office, having in fact rendered no service, recover the compensation affixed to the office when it had been paid to one in fact in the office and doing the service therein. But the cases do distinctly decide that the relation between such public officers and the authority superior to them is not that of contractors with each other, and that a claim to official emolument cannot be based upon the idea of a property interest in the office, or of that of an agreement to pay the same. The case of *Smith agt. The Mayor* (*supra*) does expressly hold that an officer *de jure* kept from the exercise of his office while waiting and willing to perform the duties of it, there being an officer *de facto* rendering the official services and receiving the payment authorized by law, may not recover of the municipality the compensation attached to the office for the time for which his title to the office was in dispute and he did not exercise it. The judgment is put upon the ground stated in *Connor's case* (*supra*), and that as there was no rendition of services nor a contract for payment the action must fail. We do not find in the reports of this court any case later than those above cited where they have been, in this respect, either expressly approved or adversely commented on. In *Hadley agt. The Mayor* (33 N. Y., 603) there is an *obiter* remark of DENIO, Ch. J., to the effect that an action for the salary of an office might probably have been successfully defended on the ground that the officer failed to perform the duties of the office and had acquiesced in the irregular order for his dismissal. In *The City of Hoboken agt. Gear* (3 Dutcher [N. J.], 265) it is said (*p.* 278) that the relation between the municipality and an

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officer of it is, at the most, a contract; that while the officer performs the duties of the office he will receive the compensation provided by law; and *Connor's case* (*supra*) is cited with approval, and the words of RUGGLES, Ch. J., that we have quoted above are repeated with emphasis, and the force of the opinion is to the end that a performance of the duties is needful for a recovery of the compensation. *The Auditors of Wayne County* agt. *Benoit* (20 Mich., 176) is to the same effect, though the dissent of COOLEY, J., and the qualified concurrence of CHRISTIANOY, J., takes from the force of the decision. And, finally, there is the case of *Dolan* agt. *The Mayor* (68 N. Y., 274), which, while protesting that it is not meant to interfere with the decision in *Smith* agt. *The Mayor* (*supra*, p. 283), puts the inability to recover of one who, though an officer *de jure*, has not actually performed the duties upon grounds of public policy and overweening public convenience. There the office had been taken by a usurper who rendered the services due from it, and for a time received from the municipality the compensation provided by law. There an action was brought on the relation of him rightfully entitled, and it was adjudged in his favor. It was held that, for so much of the salary as had been paid to the intruder before the judgment of ouster, the officer *de jure* could not recover. This conclusion was reached by the consideration that the duty put upon fiscal officers to pay official salaries could not safely be performed, unless they are justified in acting upon the apparent title of claimants, inasmuch as they would otherwise be placed in peril of deciding wrongly who was the officer *de jure*, and of putting the governmental authority, of which they were the disbursing agents, to the hazard of a compulsory payment of salary a second time. But it was also held in that case, that for so much of the salary accruing due before the judgment in favor of the officer *de jure*, and which had not been paid to the intruder, the officer *de jure* was entitled to recover. It was recognized that the salary is the compensation for the rendition of services; but it was also seen

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that so much of the salary had not been paid to any one; that the city had had the benefit of the services, though rendered by an intruder; that he could not recover therefor; that there was no equity in freeing the municipality entirely from the payment of it, and it was held consistent with all rules to treat the services as having been rendered by the intruder in the stead of the officer *de jure*, and to permit the latter to recover on that assumption. The learned counsel for the appellant, in the case in hand, sought to distinguish between cases where the compensation was by fixed fees for the specific service rendered, and where it was by an annual salary, payable at recurring periods. We are not able to perceive such a distinction as will affect the applicability of the cases cited. *Smith agt. The Mayor (supra)* was a case where the amount of the compensation depended upon the amount collected, and the amount to which the fees would run at a given rate upon the amount collected was the compensation for the duty rendered; that compensation does not appear to have been retained by the collector from the sums received by him. But the whole amount collected by all of that kind of officers, as we understand it, went into the city treasury, and the compensation of each deputy collector (and there were four of that kind of officers) was paid from the city treasury to each of them upon a calculation of what each was entitled to upon the total amount collected by the four. We do not perceive how this differs in principle, as far as the matter now in hand is concerned, from the case of an annual salary payable at fixed times through the year. And it is to be noticed that of the cases cited some of them were actions for salary, and, in the opinions in others, no distinction is taken between a compensation by salary and by fees. Indeed, if the compensation was by fees, a specific fee, payable to the officer, for each particular official act done or service rendered for any private person, there could be no basis for an action against the corporate body, for it could not be said that the service was rendered for it, or that it received the money from the pri-

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vate person for the use of the officer *de jure*. Therefore to make any ground for an action against the municipality the official emolument must have been so collected, if by fees, as to go into the municipal treasury or be in terms payable therefrom. Then the difference would be only that that by salary was a fixed and certain sum and that by fees uncertain.

The learned counsel also suggests that there is a difference where the office is held by appointment and by election. He bases the distinction that he claims upon the power that is in the appointing source to revoke on the one hand and the right of the officer to resign on the other. But there is the same right to resign an elective office and the same power in the authority that created it to abolish it or to shorten the term of it.

It is, then, to be deduced from the cases in this state that, as a general principle, the rendition of official service must precede a right to demand and recover the compensation given by law to the officer; that the disbursing officer of a municipality is protected from a second payment of that compensation, and so is his superior, when he has once made payment to one actually in the office discharging the duties of it with color of title, with his right thereto not determined against him by a competent tribunal; that when there has been such an adjudication any amount of compensation for services rendered not paid to him is due and payable to the one adjudged to be the officer *de jure*, and may be recovered by the latter of the municipality. It will be seen that the facts in these cases do not entirely cover the facts of the case in hand. Here the compensation given to the office has been paid to the intruder throughout the whole term of the office, notwithstanding that when that term was not yet half spent there had been an adjudication that the plaintiff in this case was lawfully entitled to the office and that Culkin was a usurper thereof, and, notwithstanding, that the fiscal officer of the municipality had been at once made known of that adjudication, we must seek to apply the principles established by those cases to this new state of facts.

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It is true that the plaintiff, though very willing so to do, did not, in fact, render to the city of New York any service as assistant alderman, and the *Connor case* and *Smith case*, without the *Dolan case*, would seem to stand in the way of his claim for compensation. But in the light of the *Dolan case*, Culkin, the intruder, did render service in the office that may be counted for the good of the plaintiff. It is true that the fiscal officer of the municipality has paid Culkin the salary for the whole term of the office. If he paid it in ignorance of the falsity of Culkin's claim to the office, and in view of his actual possession of it with color of title, he and his superior would have good stand against the demand of the plaintiff. By the rule in the *Dolan case* that fiscal officer was not bound to make inquest into the right to the office in clamor between the plaintiff and Culkin, and so long as the latter remained in the office in fact, with color of title to it, payment to him was all that the municipality could be compelled to do. Besides, that McVeany had not taken the oath of office until after the adjudication in his favor. He could not enter upon the duties of his office before he did that (1 *R. S.*, 119, *sec.* 20). And until he did that he had no title to exercise the office, and could render no services, and, of course, earn no compensation (*Colb. on Crim. Def. and Quo Warr.*, p. *149, and cases cited). But when the supreme court had adjudged that Culkin was a usurper, and that McVeany was of right the officer, and McVeany had taken the oath of office and the comptroller was made known thereof, the rule in the *Dolan case* ceased to work for the latter. He was not bound to inquire, but to know, then, he need not inquire. The judgment brought to his notice showed that judicial inquiry had been made for him and a result reached. After that he made payment of his own will, not in ignorance, not free from duty to obey the judgment, but with knowledge. He knowingly paid to a pretender. He was not, nor was the city, any longer protected in the payment to Culkin, and were bound to retain the arrears of salary as they accrued due and payable for the

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rightful officer, if there was a rendition of the services required of the officer by law. There was a rendition of services in fact. It was made by Culkin. After the judgment against him his rendition thereof was, by the other rule in *Dolan's case*, a rendition in the behoof of McVeany, and the salary thereafter accruing and unpaid therefor belonged to the latter and should have been paid to him.

This is so, unless some things in the case now to be noticed give protection to the comptroller and to the city. After the rendition of the judgment in his favor, McVeany took no judicial action to enforce it. He took the oath of office. He gave notice of the judgment to the comptroller, and, also, to the board of assistant aldermen. He made demand from the board of his seat among them and was refused. He did not move the courts to aid him in getting the actual possession of his seat in the board. It did not need, so far as Culkin was concerned, that he should. The rendition of a regular judgment of ouster against an intruder into a public office, actually puts him out of the office, and excludes him therefrom, and the person adjudged entitled to it, upon taking the oath of office and giving bonds, if any are required by law, becomes *eo instanti* invested with the office (*Welch agt. Cook*, 7 *How. Pr.*, 262; *The People agt. Conover*, 6 *Abb. Pr.*, 220). There is no provision, either in the Revised Statutes or in the Codes, for the issuing of any process, or taking any other proceeding upon the judgment to remove the usurper from office and place the party entitled thereto in possession, and none is required (*Id.*). There is a duty yet upon the officer *de jure*. It is to demand of the intruder all the books and papers of the office, and there is a summary mode to compel the delivery of them; that duty did not press upon the plaintiff in this case, for the intruder, it is inferable from the character of the office, had no books or papers necessary to the exercise of the office by the rightful holder of it.

It may be doubted whether the rule stated in the cases last cited is applicable in full force to such a case as this. Those

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were cases in which the office was of a kind to be held by one person singly, like that of sheriff, and not in co-operation and fellowship with others, like that of a member of a body or board made up of several of equal right and privilege, and where the act, or refusal to act, of the board might render ineffectual in fact a judgment in favor of a rightful claimant to a seat therein.

It may well be that in the case of an office to be held by one alone the judgment does operate *per se* to put into it the rightful claimant, because he can go forward at once of his own will in the discharge of the duties of it. But when to exercise the office there is needed admission to a place where the duties are to be done among several others who have equal rights, and the formal legal and the actual physical power to refuse admission to a place among them and who refuse admission, a different case is presented, and it seems that the court may be moved to send their mandate to the board to open the way to the rightful officer to his place among them and to a vote and all other privileges (*See A. & A. on Cor., sec. 702, and cases there cited*). However that may be we do not think that the omission of McVeany to move the courts for a *mandamus* avails for the protection of the defendant in this case. The comptroller had notice of the judgment of ouster and was forbidden at the same time from paying salary to Culkin, and it was his duty to observe the judgment.

It is true that upon the notice of the plaintiff having been given to the board it made inquiry into the matter and adjudged that Culkin was entitled to the seat. Had the plaintiff been a party to that proceeding a serious question would have been presented whether he was not bound by the result of it. But it does not appear that he promoted the inquiry or took part in it. The minutes of the board assert that he appeared in it by counsel. This he expressly denies in his testimony on this trial, and he is not contradicted by anything in the case save those minutes. As the plaintiff was

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nonsuited by the court and his complaint dismissed at the trial, the testimony and all inference from it are to be made most strongly in his favor. It must be taken that he was not a party in person or by counsel to the inquiry by the board, and is not precluded by their judgment. Nor does that judgment countervail the one given before it by the supreme court. That being the first upon the same matter and unreversed was of the greater force, the general jurisdiction of the supreme court therein being at least equal and concurrent, and jurisdiction of the case having been first taken by it, it bound the city and its disbursing officer. Moreover, had he appeared in the proceedings by the board, yet only to set up and insist upon the judgment in his favor by the supreme court, it may be doubted whether he would have been prejudiced by the action and conclusion of the board; and the evidence does not war with this view of his acts.

We thus come to the conclusion that for the salary accruing, due and payable before the notice to the comptroller of the judgment of the supreme court, the plaintiff cannot recover; for that, after that date, he can. By a request made by the plaintiff for the court to direct a verdict for the salary from the 1st day of July, 1869, that seems to be the date at which the plaintiff conceives his right to it may have begun. The defendant will not find fault with that as a starting point, for in its points the 18th day of June, 1869, is named in the contingency that this court take the view which has been herein expressed.

The trial court, on the facts before it, should not have shut out the plaintiff by a nonsuit from an opportunity of a verdict for that portion of the salary for the year.

The judgment should be reversed and a new trial had, with costs to abide the event.

All concur, except CHURCH, Ch. J., and MILLER, J., absent at argument.

Wheeler agt. Allen.

N. Y. COMMON PLEAS.

THOMAS WHEELER agt. IRA A. ALLEN.

Promissory note — accommodation indorser.

If an accommodation maker or indorser has no interest in the way in which the proceeds of the note are to be used, it is no defense to him that he was told the note was to be discounted by a bank, though it was in fact used and intended to be used in paying an antecedent debt.

General Term, April, 1879.

APPEAL from a judgment of the marine court, general term.

S. V. R. Cooper, for appellant.*S. E. Swain*, for respondent.

VAN HOESSEN, *J.* — Muirheid was indebted to Wheeler on a note which was past due. Wheeler pressed Muirheid for payment, and Muirheid asked if Wheeler would take a new note at three months, with Ira A. Allen, the defendant, as indorser. Wheeler said he would, and Muirheid then applied to Allen to indorse his note, for discount, at the Sixth National Bank. Allen inquired what Muirheid wanted to do with the money; Muirheid said, "to pay bills." Allen had no interest in the application of the avails of the note to any particular purpose. Allen then indorsed the note, and Muirheid took it to Wheeler, who surrendered the old note to Muirheid, by whom it was at once destroyed.

The defendant interposed two objections to the recovery which the court directed against him; or, rather, his defense consists of two branches, the loss of either one of which is fatal to his case.

1st. He insists that the note was fraudulently diverted, because it was not discounted at the Sixth National Bank.

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2d. That the plaintiff is not a *bona fide* holder for value, because he parted with nothing of value at the time he acquired the note.

The indorser, if injured by the discounting of the note at a different bank from the one at which he believed the discount would be obtained, or if injured by the application of the proceeds of the note to a purpose different from that for which he became indorser, may set up the defense of misappropriation against any one but a *bona fide* holder. If, however, he has no interest in the way in which the proceeds of the note are to be used, it is no defense to him that he was told that the note was to be discounted by a bank, though it was in fact the intention of the maker, whom he accommodated, to use the note in paying an antecedent debt, and though the note be so used (*Mohawk Bank* agt. *Corey*, 1 *Hill*, 515; *Montross* agt. *Clark*, 2 *Sand.*, 115; *Edwards on Bills*, 322; *Daniels on Negotiable Instruments*, secs. 792-794).

In this case there is nothing to show a misappropriation of the note. It was perfectly proper, therefore, to overrule the defense, even though the plaintiff were shown to hold the note as collateral security for an antecedent debt (*Schepp* agt. *Carpenter*, 51 *N. Y.*, 602; *Grocers' Bank* agt. *Penfield*, 69 *N. Y.*, 502). But there was another reason for directing a verdict for the plaintiff; he was a *bona fide* holder for value, before maturity and in the regular course of business. He surrendered the old note, which was destroyed by Muirheid. The giving up of the old note made him a holder for value. The law on this point is settled by a long course of decisions, and *Moore* agt. *Ryder* does not lay down a different doctrine. The judgment and order appealed from should be affirmed, with costs.

DALY, C. J., concurred.

Thorne agt. Newby.

SUPREME COURT.

SUSANNA W. THORNE agt. SARAH B. NEWBY and others.

Foreclosure of mortgage — Parties — Judgment for deficiency.

In an action to foreclose a mortgage, the bond accompanying the mortgage being executed by a person other than the mortgagors as well as by the mortgagors, it is proper to make such obligor a party to the action and to demand against all the obligors a judgment for any deficiency.

The objection that an action "*in personam*" at law is united with a claim "*in rem*" in equity is not well taken (2 R. S., p. 191, sec. 154; *Scofield* agt. *Doecher*, 72 N. Y., 491).

Special Term, February, 1880.

DEMURRER to complaint.

Robert P. Harlow, for demurrer.*Henry W. Clarke*, opposed.

VAN VORST, J. — This is an action for the foreclosure of a mortgage made by the defendants, Sarah B. and Emma B. Newby. The bond executed by them at the same time, and bearing even date with the mortgage, is also executed by *Thomas B. Newby*. A decree is asked for a sale of the mortgaged premises and for a judgment for any deficiency that may arise on such sale against *all the defendants*.

The defendants demur on the ground that the complaint does not state facts sufficient to constitute a cause of action, and because causes of action are improperly united in this, to wit: A cause of action "*in personam*" at law has been united with a cause of action "*in rem*" and in equity; an action on the bond being, in substance, united with a claim to foreclose a mortgage.

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The Revised Statutes provide, that if the mortgage debt be secured by the obligation or other evidence of debt of any other person besides the mortgagor the complainant may make such person a party to the bill, and the court may decree payment of the balance of such debt remaining unsatisfied after a sale of the mortgaged premises, as well against such other person as the mortgagor, and may enforce such decree as in other cases (2 *R. S.*, p. 191, sec. 154).

The same provision is, in substance, found in section 167 of the former Code and is still in force.

These authorities justify the plaintiff in joining in this action all the parties to the bond, the payment of which is secured by the mortgage sought to be foreclosed, and in demanding a judgment against all the obligors for any deficiency which may arise. As is said by FOLGER, J., in *Scofield* agt. *Doscher* (72 *N. Y.*, 491): "The statute," to which reference is made above, "was enacted to give the court, in which the foreclosure of the mortgage was had, full jurisdiction over the whole subject, and to save the necessity of actions at law and to allow one court to dispose of the whole subject instead of compelling the parties to resort to different tribunals" (*Equitable Life Ins. Co.* agt. *Stevens*, 63 *N. Y.*, 341; *In Matter of Collins*, 17 *Hun*, 289).

But since there is at present power in this court to administer redress, both legal and equitable, and to direct issues of fact arising in actions called equitable to be determined by a jury, all objections to the plaintiff's complaint of the nature indicated by the demurrer is removed.

There should be judgment for the plaintiff on the demurrer, with costs.

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SUPREME COURT.

CHARLES A. CLEGG agt. THE AMERICAN NEWSPAPER UNION
and others.

Res adjudicata — *Condition precedent* — *Performance* — *Tender* — *Waiver* —
Modified or supplemental contract essentially variant from the orig-
inal — *Insufficiency of complaint.*

Res adjudicata has no proper application on demurrer to an amended complaint where the amendment is material and the pleading essentially different by reason of the amendment. Such amendment relieves the question from being *res adjudicata*, and the complaint is tested as to its sufficiency or insufficiency by the rules of pleading otherwise applicable. Where a complaint, based upon an alleged agreement between plaintiff and defendants, omitted to set out the agreement in full, was held good on demurrer at first, but afterwards the complaint was amended voluntarily, giving the agreement in full, and the portion of the agreement omitted in the original complaint and included in the amended complaint, consists of a condition precedent to be performed by plaintiff before any obligation of defendants arises, and the complaint so amended fails to allege performance of such condition precedent, or tender or waiver of performance:

Held, the objection based upon the absence of an averment of the performance of the condition precedent is well taken; and *res adjudicata*, though it might have been available to defendants in answer to a demurrer had the amended complaint been based upon the contract as originally set forth, is not available as the complaint stands by reason of the presence of the precedent condition not shown to have been performed.

Special Trial Term, May, 1880.

THIS action is brought by Charles A. Clegg against eleven defendants, six natural persons and five corporations.

The complaint alleges that plaintiff is an advertising agent in the city of New York; that defendants are, and were during a time specified, associated together as printers and publishers of newspapers; that, May 3, 1876, an agreement was made and entered into by and between plaintiff and the defendants, other than defendants Beals, Foster and Rowell,

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and in which the latter defendants afterwards became jointly interested with the others; that differences and disputes having arisen between the parties to this agreement a further, other and supplemental agreement was entered into August 1, 1876, between the plaintiff on the one part and A. J. Aikens representing the defendants on the other part. This latter agreement is in the form of a written proposition submitted by plaintiff to Mr. Aikens for his acceptance. The terms and conditions of the new agreement first proposed are those to be performed by himself and in these words: "I hereby agree to carry out the contract for \$50,000 (gross) worth of space made with you in the American Newspaper Union lists, May 3, 1876, by paying \$1,000 cash and giving my seven notes for the balance," &c., "on your agreeing to carry out the following," &c. To the terms of the new agreement, as proposed by plaintiff, defendants assented, as the complaint shows, by and through the written acceptance of Mr. Aikens acting for them in the premises. The \$1,000 cash was never paid, so far as the complaint shows, nor is there any averment in the complaint that the seven notes were ever given as provided. The complaint does not allege any offer or tender of either the cash or the notes.

The original contract was for \$50,000, but the payments made on account of it aggregate only \$14,790.19, and, as the complaint indicates, this was all paid by plaintiff in advance and before the supplemental agreement.

Plaintiff bases his action upon an alleged refusal by defendants to perform their part of the agreement. The only assignment of breach in the complaint is as follows: (1.) "The said defendants wrongfully and fraudulently refused further to print," &c. (2.) "And did then and there notify the plaintiff of such refusal." (3.) "That defendants did then and there break the said agreements." (4.) "Defendants then and there admitting that they had not kept but had broken the said agreement."

The relief demanded is \$50,000 as damages. The allega-

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tions of damages are, in general language, as follows: "That by reason of the wrongful and fraudulent conduct of the defendants in the premises, their violation and breach of their said agreements and undertakings with this plaintiff the plaintiff has sustained damages to the amount of fifty thousand dollars (\$50,000)."

Defendants demur to the complaint on the ground of insufficiency; that the complaint has been amended since the demurrer of March, 1879, and that the present amended complaint differs from it in that a paper at first set forth only in part is now set forth in full the plaintiff concedes; that such paper is the supplemental agreement upon which plaintiff bases his action is apparent from the present amended complaint; that a portion of the supplemental agreement omitted in the first amended complaint and inserted in the second amended complaint is the identical precedent condition upon which defendants make their first point is obvious from reference thereto.

The first amended complaint differs from the second amended complaint in other respects to a large extent.

In support of the demurrer,

Chauncey B. Ripley, attorney for George P. Rowell.

Edward C. Ripley, attorney for The New York Newspaper Union and others.

Joseph S. Auerbach, attorney for defendants Cramer.

John K. Porter, of counsel, for all the defendants, urged:

I. There is no averment in the complaint that plaintiff paid the money and gave the notes required by the supplemental agreement of August 1, 1876. The absence of such averment is fatal to the supposed cause of action. The paying of such money and the giving of such notes constituted a condition precedent, to be performed by plaintiff before any obligation arose in his favor. Performance on his own part not

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appearing affirmatively on the face of the complaint, it discloses no cause of action and is bad on demurrer for want of substance (*Dunham* agt. *Pettee*, 8 *N. Y.*, 508; *Van Schaick* agt. *Winne*, 16 *Barb.*, p. 94).

II. The allegation of readiness and willingness to perform does not cure the defect. A further averment of an offer or tender of performance is requisite, otherwise the pleading is insufficient and bad on demurrer. (1.) This is so upon principle, for however ready and willing plaintiff may have been to perform his part of the agreement it could in no way affect defendants to their prejudice unless such readiness and willingness were made known to them by an offer of performance. For aught that appears defendants were wholly ignorant of such readiness and willingness. (2.) It is so, too, by authority; it has been expressly adjudicated that an averment that a party was ready and willing is not enough, even though performance was not required of him. It must be shown that an offer had been made or the complaint is demurrable (*Van Schaick* agt. *Winne*, 16 *Barb.*, p. 94; *McIntyre* agt. *Clark*, 7 *Wend.*, 330).

III. No damage is shown by averment of facts; nothing but legal conclusions. A pleading is ill on demurrer, when founded on a claim for damages, if it avers nothing but the pleader's own inferences and conclusions. (1.) Such vague generalities as "has been greatly damaged" "has sustained damages to the amount of," &c., are not issuable matter but conclusions of law merely. They do not enable the court to say that the plaintiff has sustained damage (*Allen* agt. *Gould*, 1 *Wend.*, 182). (2.) Facts must be pleaded from which damages may appear to have arisen, such as, for example, that the work was not done; that some specific customer neglected to pay; that certain business was lost. The averments of the complaint involve no question of fact (*Van Schaick* agt. *Winne*, 16 *Barb.*, p. 95).

IV. There is no assignment of breach such as good pleading requires, the complaint, therefore, is fatally defective in

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that respect. (1.) A good assignment of breach is essential on demurrer (*Comyn's Dig., Pleader, C. 44*). The breach must distinctly appear by express words or by necessary implication, and the facts must justify it (*Schenck agt. Naylor, 2 Duer, 675*). (2.) The averment "that defendants did then and there break the said agreements" is no assignment of breach under the rules of pleading. A denial of it would raise no issue; it admits of no evidence; it would not support a verdict or a judgment; it is a conclusion of law, a mere nullity (*Van Schaick agt. Winne, supra, p. 95*). (3.) So the averment, "defendants then and there admitting that they had not kept but had broken their said agreement" is matter merely evidentiary and insufficient on demurrer (*Mills agt. Gould, 1 Abb. N. Cas., 97*). "The issuable facts in a legal action, and the facts material to relief in an equitable suit, should be stated to the complete exclusion of the law and the evidence (*Pomeroy's Rems., p. 556, sec. 529; id., secs. 526, 527; Steph. on Pl., 310*). (4.) The refusal alleged is not operative as a breach for the several independent reasons following: *First*. There is nothing to show that any work was due when the refusal was uttered, that the time for performance had actually arrived. To render a refusal effectual as a breach the time must actually have arrived and passed so that there remains no *locus penitentie*. It is only when the day for performance has passed that an action can be maintained in our state. Until this happens no legal right has been violated; such is the well-established rule (*Traver agt. Halstead, 23 Wend., 70 [71]; Mills agt. Gould, 1 Abb. N. Cas., p. 97*). *Second*. It must be shown that something was actually withheld, that there was damage (*Id.*). *Third*. It does not appear affirmatively, as the cases require, that the refusal was addressed to anyone who had a right to demand or accept performance. It should appear, upon the face of the plaintiff's complaint, that the refusal was addressed to plaintiff or to his authorized representative, otherwise it was a nullity and the cases so hold (*Traver agt. Halstead, 23 Wend., p. 70; Mills agt. Gould, 1*

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Abb. N. Cas., 97). The breach of a contract, like the contract itself, must be *inter partes*; a stranger cannot participate (*Pars. on Contrs.*, vol. 1 [5th ed.], p. 8). *Fourth.* The averment that plaintiff was notified of such refusal is conclusive evidence that the refusal itself was addressed to some person other than the plaintiff (*Traver agt. Halstead*, 23 *Wend.*, pp. 69, 70). *Fifth.* If the refusal itself was a nullity it follows necessarily that any notice of it must be without legal force for a nullity furnishes no basis for any legal proceeding (*McNamara on Nullities*, p. 6 [1]).

V. *Res adjudicata* has no proper application. Defendants are not concluded by the decision referred to, because it appears affirmatively that the complaint now demurred to is amended by the insertion of a precedent condition not contained in the former pleading; and the first point taken is that there is no averment of performance of that condition by plaintiff. The fact that plaintiff was to perform the condition referred to was not present in the complaint upon which the order of March, 1879, was made. It does not appear that the points now raised are the same points raised on the previous demurrer. (1.) The doctrine of *res adjudicata* applies only to a judgment already pronounced on the same facts. A party is concluded by a former adjudication only as to the points covered by the former decision. If the facts passed upon by the former judgment differ, *res adjudicata* has no application (*Goddard agt. Benson*, 15 *Abb. Pr.*, 191). (2.) To render a former adjudication a bar it must appear affirmatively that such adjudication was between the same parties as well as upon the same subject-matter. So held on demurrer (*Goddard agt. Benson*, *supra*).

VI. The assertion in plaintiff's second point that "the complaint states a good cause of action — that no better cause of action than this could possibly be stated" is simply the *ipse dixit* of counsel, and avails nothing. (1.) As to the agreement alleged to have been made between plaintiff and defendant, the last, "the further, other and supplemental agree-

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ment" — the new agreement supersedes and controls: "the terms of which are stated," as follows: "I hereby agree to carry out the contract for \$50,000 (gross) worth of space made with you," &c., "by paying one thousand dollars cash, and giving my seven notes for the balance," &c. (2.) "That the plaintiff paid in advance," &c., * * * "in the aggregate, the sum of \$14,790.19 is, in the absence of an affirmative showing that more was paid, is conclusive that payment of the sum of \$50,000 was not made. Besides, this was paid in advance; but the \$1,000 was to be paid on making the new agreement, and the balance, \$10,000, in seven notes. (3.) It does not appear that the \$1,000 cash was any part of the \$14,790.19, but by necessary implication it could not have been. So of the \$10,000 in seven notes. How can it be maintained that plaintiff performed his part? (4.) The assertion that defendants "suddenly stopped," after performing the agreement in part, is unfounded. On the contrary, there is no allegation that they ever stopped at all — only that they refused, without alleging that their refusal was addressed to any person certain. (5.) Plaintiff has not shown performance on his own part, nor tender of performance; nor has he pleaded any waiver or other excuse. (6.) Part performance is not available to plaintiff as an excuse; it would not be if pleaded; but it is not so pleaded; the matter relating to that subject being merely evidentiary. It has been distinctly and repeatedly held that part payment or other partial compliance with the terms of a contract does not operate as a waiver or excuse for the non-performance of a condition precedent (*Haden* agt. *Coleman*, 42 *N. Y. Superior Court Rep.*, 256; *Barton* agt. *Hermann*, 11 *Abb. [N. S.]*, 378).

In opposition,

William H. O'Dwyer and *Solomon Hanford*, for plaintiff.

I. The question of the sufficiency of this complaint is *res adjudicata*.

II. The complaint states a good cause of action.

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BEACH, J. — The material amendments of the complaint relieve the question from being *res adjudicata* by the former decision, which appears to have been made upon a pleading in some respects essentially different.

The objection, based upon the absence of an averment of the performance of the condition precedent, is well taken. Upon the acceptance, by defendant, of the plaintiff's proposal, the plaintiff was required to pay the sum named and give the notes. There is no allegation, either of this having been done, or of a tender, or of any acts of the parties establishing a waiver.

The second point of the learned counsel for the plaintiff would be unanswerable, if the action was brought for the violation of the agreement therein stated. But it is founded upon the contract set forth in the complaint which is quite different in calling for the cash payment and notes immediately upon the acceptance by the defendant of the plaintiff's proposition. In view of this conclusion the other points have not been examined.

Judgment for the defendants, with leave to the plaintiff to amend upon payment of costs.

N. Y. COMMON PLEAS.

WILLIAM BARTELS agt. THOMAS CUNNINGHAM.

Execution issued against a city marshal on district court judgment — to whom to be returned.

An execution issued against a city marshal on a district court judgment, a transcript of which has been filed in the county clerk's office, must be returned by the sheriff to the clerk of the court of common pleas and not the clerk of the city and county of New York.

Special Term, June, 1880.

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WILLIAM BARTELS recovered a judgment of \$119.90 against Thomas Cunningham, a city marshal, in the first judicial district, for an unlawful levy. Transcript of the judgment was filed in the county clerk's office; an execution was issued to the sheriff on the judgment out of the court of common pleas, and made returnable to the clerk of the court of common pleas. The sheriff returned the execution to the county clerk instead of the clerk of the common pleas, and refused to return the same as he was required, claiming that under the new Code all executions issued out of the court of common pleas on district court judgments are returned to the county clerk. The plaintiff thereupon made a motion to compel the sheriff to return the execution to the clerk of the court of common pleas.

George H. Kracht, for motion.

Malcolm Graham, for sheriff, opposed.

VAN HOESSEN, J. — The bonds of city marshals are filed with the court of common pleas. Where a judgment is recovered against a marshal and his sureties it is the duty of the clerk to indorse on the marshal's bond a memorandum of the amount, and to credit each surety with the amount paid on account of such judgment. When the amount of judgments recovered against a marshal and his sureties is equal to the amount of his bond it is the duty of the clerk of the court of common pleas to notify the mayor of the fact that the marshal may be removed, or at least suspended, if he does not then, on being requested, file a new bond. These duties are devolved upon the clerk of the court, and it is necessary for their performance that he should have possession of the documents which show whether or not a marshal should be required to furnish a new bond. These considerations led to the enactment of the act known as chapter 484, Laws of 1862, which provides a system, complete in itself, adapted especially

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to the city of New York, and intended for the security of suitors in district courts of the city. The act of 1862 is a local act, passed for a particular purpose, and, therefore, was not repealed by the general language of section 1367, Code of Civil Procedure, which contains no evidence of an intent to abrogate it. The rule applicable to the construction of statutes under consideration is stated by the court of appeals, *In the Matter of the Commissioners of Central Park* (50 N. Y., 497), and in *The People agt. Quigg* (59 N. Y., 83). It is this: "A special and local statute providing for a particular class of cases is not partially repealed or amended in some of its provisions by a statute general in its terms, provisions and applications, unless the intention of the legislature to repeal or alter the particular law is manifested, although the terms of the general act would, taken strictly and but for the special law, include the case provided for by it."

The execution should be returned to the clerk of the court of common pleas.

SUPREME COURT.

AGNES ROBERTSON BOUCICAULT agt. DION BOUCICAULT.

Arrest—in action for divorce brought by wife against husband—when allowed—application for, may be made to judge out of court in first judicial district—Code of Civil Procedure, sections 149, 550, 575, 768, 770.

Subdivision 4 of section 550 of the Code of Civil Procedure, was intended and is a substitute for the writ of *ne exeat*.

Where, in a suit by the wife against her husband, for a divorce, the plaintiff shows that the defendant is about to depart from the state, with no present intention of returning, except, possibly, to pass through it, and that he is to sail for Europe within a month, to be gone indefinitely:

Held, that, a case is made out in which an order of arrest may lawfully issue. As the judgment may require the performance of an act, the neglect or refusal to perform which would be punishable by the court as a contempt, the case is brought within subdivision 4 of section 550 of the Code of Civil Procedure.

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Under section 770 of the Code of Civil Procedure, in the first judicial district, a motion, which elsewhere must be made in court, may be made to a judge out of court, except for a new trial upon the merits.

An application for an order of arrest may be lawfully made to, and properly granted by, a justice out of court in the first judicial district.

Any application which elsewhere may be made in court, may here be made at any time to a judge out of court.

An order of arrest is not irregular which prescribes the form of undertaking as directed in subdivision 1 of section 575 of the Code of Civil Procedure.

A defendant's right to the jail liberties under section 149, is not in the least affected by such direction. If the defendant does not desire to give the bail required by the order to effect his discharge, he has a perfect right to offer the limit bond under section 149, and the sheriff would be bound to accept it.

First Department, General Term, May, 1880.

APPEAL from judge DONOHUE's order denying defendant's motion in the divorce suit brought by plaintiff against defendant to vacate the order of arrest previously granted by him, under subdivision 4 of section 550 of the Code of Civil Procedure.

George Bliss, for plaintiff and respondent.

Richard O'Gorman and *A. J. Dittenhoefer*, for defendant and appellant.

BARRETT, J. — The order of arrest was not irregular in prescribing the form of undertaking; that direction might have been stricken out or disregarded as surplusage. But as the order in that respect strictly follows subdivision 1 of section 575 of the Code of Civil Procedure the defendant was not prejudiced. If the direction had been omitted, the sheriff would have been required by law to take an undertaking in precisely the same form. It was quite proper to furnish the officer with this specific guidance, rather than require him to gather the proper form from the papers. The defendant's

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right to the jail liberties under section 149 was not in the least affected by the direction in question. If defendant did not desire to give the bail required by the order to effect his discharge, he had a perfect right to offer the limit bond under section 149, and the sheriff would have been bound to accept it. Nor is the point well taken that the order of arrest was granted by Mr. justice DONOHUE after the adjournment for the day of the special term, at chambers. The objection is not specified in the order to show cause, nor is there any proof that the order of arrest, which purports to have been made by the court, was not in fact so made. For aught that appears, Mr. justice DONOHUE was holding the special term for the trial of equity causes. Certainly the verity of the order cannot be impugned by loose statements made upon information and belief. But, further, it is provided by section 770 of the Code of Civil Procedure (following subdivision 2 of section 401 of the old Code) that in the first judicial district a motion, which, elsewhere must be made in court, may be made to a judge out of court, except for a new trial upon the merits. Under section 768, an application for an order is a motion. The present application was, therefore, lawfully made to, and properly granted by, a justice out of court (*Disbrow* agt. *Folger*, 5 *Abbott's Pr. R.*, 53; *Louber* agt. *Mayor*, *id.*, 325). There is nothing in the suggestion that the effect of section 770 was merely to authorize judges to grant court orders during the actual session of the court as auxiliaries or aids thereto. The object, undoubtedly, was to provide for the great pressure of *ex parte* business in this city and the emergencies which are constantly arising. To limit the application of the section to the hours when the chambers special term is actually in session, would be very largely to nullify the useful purpose sought to be attained. When the court is in session, the justice presiding can generally pass upon all the applications without assistance. It is during the hours of recess or adjournment that the exigencies contemplated and provided for most frequently arise. There is no such limitation as that contended for to be found

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in the letter of the section ; clearly none in the spirit or purpose. Under the broad language used, we think that any application which elsewhere may be made in court may here be made at any time to a judge out of court. Next it is contended that the case at bar is not one in which an order of arrest could lawfully issue, for the reason that the judgment will not require the performance of an act the neglect or refusal to perform which would be punishable by the court as a contempt, and that, consequently, the case is not brought within subdivision 4 of section 550 of the Code of Civil Procedure. This subdivision, Mr. Troop says, in his notes, was intended as a substitute for the writ of *ne exeat*. That writ, it was well settled, would issue in such case as the present (*Denton* agt. *Denton*, 1 *Johnson Chancery*, 441 ; *Forrest* agt. *Forrest*, 10 *Barb.*, 46 ; *Bushnell* agt. *Bushnell*, 15 *Barb.*, 399). The question, therefore, is, whether the codifier has frustrated his own intention. We think not. The court may ultimately, in this action, render a judgment requiring the defendant to perform an act the neglect or refusal to perform which would be punishable as a contempt. At all events it cannot, with certainty, be asserted that the judgment will not, and that lawfully, require the performance of such an act. The defendant may be enjoined from interfering with the plaintiff's custody and control of the children, or, under other circumstances, he may be required to transfer and deliver them into her custody and control. He may also be required to give reasonable security for the maintenance of his children and for any allowances awarded to his wife (3 *R. S.*, *Banks' ed.*, 159, *sec.* 74). It is true that, in default, his personal property and the rents and profits of his real estate may be sequestrated ; but that provision of the statute is partially additional to, and does not exclude, the ordinary remedy by attachment. If, then, the defendant, having the ability, is required by the final judgment to furnish reasonable security and neglects or refuses to perform the act of giving it, he may be punished by the court as for a contempt. The

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requirement would be "a lawful mandate," and the neglect or refusal to comply would be "disobedience thereto." The case would thus be brought within section 14, subdivision 3 of the Code of Civil Procedure. The case of *Park* agt. *Park*, decided by the court of appeals on the 24th of February, 1880, seems to be directly in point, and fully supports the views above expressed. It even goes further, and substantially overrules *Lansing* agt. *Lansing* (4 *Lansing*, 377). "The position," said Mr. justice MILLER, "that payment of the costs and alimony cannot be enforced by proceedings for contempt is sufficiently answered in the opinion of the general term, with which we concur, and does not require discussion." The opinion of the general term was delivered by LEARNED, P. J., and *Lansing* agt. *Lansing* was there distinctly referred to and criticised. Finally, the plaintiff makes a sufficient case for the order. She shows that the defendant is about to depart from the state, with no present intention of returning, except, possibly, to pass through it, and that he is to sail for Europe within a month, to be gone indefinitely. Although the defendant moved to vacate upon an affidavit of his own, he made no denial of these charges. They would have been sufficient to justify a *ne exeat* (*Cases before cited* and 18 *Ves.*, 353). Coupled with the plaintiff's undenied averment, they certainly make out a *prima facie* case of danger that by reason of such departure the judgment requiring performance of some of the acts suggested will be rendered ineffectual. The order appealed from should, therefore, be affirmed, with ten dollars costs and the disbursements of the appeal.

DAVIS, P. J., and DANIELS, J., concurred.

Matter of Roberts.

N. Y. COMMON PLEAS.

Matter of application of ANDREW L. ROBERTS for discharge from imprisonment under execution at the suit of THE NEW YORK GUARANTY AND INDEMNITY COMPANY.

Discharge from imprisonment—Meaning of “just and fair”—When discharge will be denied—2 Revised Statutes, chapter 5, article 6—res adjudicata.

Under the provisions of the act providing for the discharge of imprisoned debtors where the proceedings are had under article 6, chapter 5, part 2, title 1 of the Revised Statutes:

Held, that the proceedings of the debtor are not “just and fair” where he has removed his own property with intent to defraud his own creditors or to benefit himself or his own family, although neither he nor his family have been benefited by the act—his creditors nevertheless having been deprived of the property.

Held, also, that where the debtor has procured from the creditor, at whose suit he is imprisoned, property by fraud, even if he has spent the proceeds in any way that would be unobjectionable if they were his own, and if by loss or accident he is deprived of them, his proceedings are not “just and fair.”

Held, further, that where the debtor has combined or united with others to fraudulently obtain the property of the creditor at whose suit he is imprisoned, even if such others got the proceeds of the fraud and he got none, his proceedings are not “just and fair” within the meaning of the statute.

But, on the other hand, if the prisoner, while legally liable for the debt or the damage growing out of the fraud or tort, was yet innocent of a guilty intent, and either received none of its fruits, or properly accounts for what he got, the tort in question would be no bar to his discharge.

In this case if the judgment against the prisoner is conclusive that he had knowledge of the fraud by which the money was procured from the plaintiff, it would be indisputable evidence that the debtor's proceedings have not been “just and fair,” and would be fatal to this application for his discharge. Whether the judgment is conclusive or not as to that fact depends on whether such a finding was indispensable to plaintiff's recovery.

If the judgment does not necessarily involve a finding that he had a fraudulent intent or guilty knowledge, the question is an open one and

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may be tried in this proceeding ; if otherwise, then having been once litigated and determined between the plaintiff and himself, it cannot be retried, but he is bound by it no matter how onerous the consequences may be.

An adjudication in proceedings under the fifth article of chapter 5, part 2, title 1 of the Revised Statutes, is conclusive upon any question that is determined, which subsequently arises under the sixth article of the same chapter.

The principle of the rule as to *res adjudicata* (except in cases of mere motions incidental to an action) has no reference to the form or the object of the litigation in which the particular fact is determined which is thenceforth to be deemed established as between the parties to the dispute. The form or object of the prior litigation does not alter the conclusive effect of the judgment or decision.

Special Term, June, 1878.

J. F. DALY, J.— These proceedings are had under article 6, chapter 5, part 2, title 1 of the Revised Statutes. The execution under which defendant is imprisoned was issued December 15, 1877, upon a judgment recovered January 6, 1877, for \$91,015.35, in the superior court of the city of New York, in an action for money had and received wherein the New York Guaranty and Indemnity Company were plaintiffs and Andrew L. Roberts, Lydia J. Roberts, Valentine Gleason, Amelia A. Gleason and Horace S. Corp were defendants. The moneys so had and received from the plaintiff were obtained upon the pretended security of forged bonds of the Buffalo, New York and Erie Railroad Company in June, July and August, 1873, which it was alleged were knowingly uttered for the purpose. An order of arrest in the action for the fraud in contracting the debt was issued against Roberts holding him to bail in \$85,000, and has never been vacated.

Objection to the discharge of Roberts from imprisonment is made (among other grounds) because the judgment and order of arrest are, it is argued, conclusive evidence against him that "his proceedings are not just and fair" within the meaning of the sixth and eighth sections of the statute under which he applied for his discharge. As the determination of

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this question against the prisoner would render further effort on his part to obtain a discharge ineffectual unless the decisions were reversed, I have deemed it proper to examine the point preliminarily.

It is urged by the plaintiff that the statute, when it requires the court to determine whether the prisoner's proceedings are just and fair and to grant a discharge or withhold it as that question is decided in his favor or not, does not refer merely to the proceedings in court under the statute, the correctness of his petition, schedule and account and the truth of his oath "that he has not at any time or in any manner disposed of or made over any part of his property with a view to the future benefit of himself or his family, or with an intent to injure or defraud any of his creditors" (*section 5 of article 6*), but that the terms "just and fair" involve a more extended inquiry, it being, as it is urged, repugnant to a sense of justice to adjudge the prisoner's proceedings just and fair when he has been already adjudged participant in a fraud by which a vast sum was obtained from the plaintiffs on forged bonds and for which fraud he is now imprisoned. On the other hand it is argued that while, in the broad sense of the terms, no man's proceedings, generally, can be just and fair if he had been convicted of fraud, this might be equally said in every case of tort, and the judgment in every case would be a bar to a discharge from imprisonment upon execution under it, a consequence evidently not contemplated by the statute; that if a prisoner be held for a judgment obtained against him for his fraud, it is enough to inquire what has become of the money or property fraudulently obtained, and that the utmost severity in such a case requires only that he be imprisoned until he has made good or restored what he got; that justice equally requires that the judgment should be no bar to his discharge if it appear that he never benefited by the fraud for which it was obtained; that the question whether any of the spoil fell to him, if not necessarily involved and decided in the judgment, may be inquired into in these proceedings; and

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that even if the evidence disclosed that he shared in the fruits of the fraud he can only be required to account for the disposition of them.

In the case of *Watson* (2 *E. D. S.*, 429) it was held that the prisoner's proceedings were not just and fair, because he had removed his property from the state and disposed of it with intent to defraud his creditors. *Watson* and his brother were copartners, and becoming hopelessly insolvent fled to California with \$8,500, which they spent, and were unable to account for satisfactorily. The decision in that case established: 1. That in the investigation as to whether the debtor's proceedings are just and fair, the court is not limited to any particular time or transaction; and 2, that a removal or disposition of the debtor's property, with intent to defraud any of his creditors, is a bar to his discharge, no matter in what way he has spent the proceeds, or, even if he has lost them or the property by unfortunate speculation. It was said in that case by chief justice DALY, that the statute intends to distinguish between the unfortunate and the fraudulent debtor, and that the former should have the benefit of the act and the latter should not, and if debtors who have fraudulently disposed of their property have nothing wherewith to satisfy their creditors, they must seek relief from the legislature and not from the court. It was said by judge WOODRUFF, in the same case, that where the absconding debtor wastes the money he has taken, in profuse expenses, gambling or adventures of any kind, including a large sum employed in litigation to prevent his creditors reaching him, he is not entitled to a discharge; that such a man is not the object of that protection and relief the statute has provided for an unfortunate but honest debtor; that the case would be the same if the money fraudulently removed had been used in living or lost by unforeseen or inevitable calamity, or even used by the debtor in an effort to make money in California to pay his creditors, for the removal of the money or property was yet fraudulent as to them.

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The rule governing the question as to what proceedings of the debtor are just and fair, is certainly severe as the above citations show. It goes the length of declaring that if the debtor, with intent to deprive his creditors of the benefit of his property, places it out of their reach and then loses it by misfortune, or the chances of trade, or spends it in providing necessities for his family, he is barred of his discharge and may be perpetually imprisoned. The terms of the debtor's oath to his petition (above cited) justify this decision that the offense lies in putting the property out of his creditors' reach, not in the subsequent use or disposition of it.

If such is the little favor shown the debtor who has disposed of *his own* property in order to defraud his creditors, what is to be said of the debtor who has, by fraud, taken or helped to take the property of his creditor? There is an immeasurable difference in the degrees of offense in the two cases. Is the creditor, whose injury is that he has been deprived of his resort to the debtor's effects for payment, to keep the latter in prison indefinitely, while the creditor who has been robbed outright must see the prisoner walk forth with a certificate that his proceedings have been "just and fair?" To answer affirmatively is to convict the law of injustice to both creditors and debtors. It will not do to say that if the robber got any thing by his crime he will be imprisoned till he restore it; it is not the question of benefit yielded to the prisoner by the fraud which is to be considered, but of damage to the creditor. Is the accomplice in a fraud to say: It is true I helped in the scheme to get the plaintiff's money, but I received no part of it? Is this an answer which the trusted clerk or cashier or depositary would be allowed to make if he held the door open while others plundered? The test of the offense is the intent of the debtor, the taking for the purpose of depriving the creditor of the property, and I can only see a graver offense and greater bar to his discharge from imprisonment when the property taken belonged to the creditor instead of to the debtor; and it seems just to hold, the proceedings of the

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debtor not just and fair not only in the case (1) of the removal of his own property with intent to defraud his creditors or to benefit himself or his family, although neither he nor his family have been benefited by the act—the creditors nevertheless having been deprived of the property; but also in cases (2) where the debtor has procured from the creditor at whose suit he is imprisoned property, by fraud, even if he has spent the proceeds in a way that would be unobjectionable if they were his own, and if by loss or accident he is deprived of them; and in cases (3) where the debtor has combined or united with others to fraudulently obtain the property of the creditor at whose suit he is imprisoned even if such others got the proceeds of the fraud and he got none. But, on the other hand, if the prisoner, while legally liable for the debt or the damage growing out of the fraud or tort, was yet innocent of a guilty intent and either received none of its fruits or properly accounts for what he got, the tort in question would be no bar to his discharge. Such might be the position of a person sued for conversion who, while actually guilty of disposing of the property of another, may yet be ignorant of the rights he is invading; or of a person sued for obtaining, in concert with others, money by false pretenses, may be liable for the debt, but as to the crime, was an ignorant cat's-paw used by the real conspirators.

In the case at bar, if the judgment against the prisoner Roberts is conclusive that he had knowledge of the fraud by which the money was procured from the plaintiff, it would be indisputable evidence that the debtor's proceedings have not been just and fair, and would be fatal to this application for his discharge. Whether the judgment is conclusive or not as to that fact, depends on whether such a finding was indispensable to plaintiff's recovery, and this must be ascertained from the pleadings. If the judgment does not necessarily involve a finding that he had a fraudulent intent or guilty knowledge, the question is an open one and may be tried in this proceeding; if otherwise, then, having been once litigated and determ-

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ined between the plaintiff and himself, it cannot be retried, but he is bound by it no matter how onerous the consequences may be.

A further and most serious objection is made to the discharge of the prisoner upon this petition. It appears from the record that before judgment and execution in this action, and while defendant was imprisoned upon *mesne* process, he applied to one of the judges of this court, under the fifth article of chapter 5, part 2, title 1 of the Revised Statutes, in the usual form, praying that his estate might be assigned for the benefit of his creditors, and that his person might thereafter be exempted from arrest or imprisonment by reason of any debts arising upon contracts previously made, and that he be discharged from imprisonment. That application was opposed by the plaintiff herein, and other creditors of Roberts, and was denied upon the ground that the prisoner had made conveyances of his property with intent to defraud his creditors (*Opinion of judge VAN HOESSEN, June, 1876, special term*). The conveyances thus decided to be fraudulent, are the same which are attacked as fraudulent in this proceeding, and which the debtor claims now, as he claimed in the former proceeding, to be an honest disposition of his property. The plaintiff contends that the decision in the former proceeding determines one of the controlling questions arising on the present application, viz.: Whether the petitioner had, at any time or in any manner, disposed of or made over any part of his property, with an intent to defraud his creditors; that it has been adjudged that the petitioner has disposed of the property now under consideration with that intent, and that such adjudication is conclusive as between him and any creditor who opposed the discharge asked for in the former proceeding.

The question whether the petitioner has, at any time or in any manner, disposed of any of his property, with intent, to defraud his creditors is vital in the proceeding at bar under the sixth article of the chapter cited above. This was the

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very point of the decision *In the Matter of Watson* (2 *E. D. S.*, 429), based upon the oath which the petitioner is required by the fifth section of that article to make, and it was decided that if it should appear that the petitioner had made any such disposition of his property his application should be denied. The imprisoned debtor who applies under the fifth article of the chapter for exemption from imprisonment is required to make substantially the same oath (*sec. 2, art. 5, chap. 5, 2 R. S.*), and if that oath be false his application must be denied as the application of the petitioner, Roberts, under that article of the Revised Statutes, was denied by judge VAN HOESEN.

As the conveyances adjudged fraudulent in the former proceeding are the same which the petitioner now alleges to be *bona fide* and the creditors again attack, it would be in principle a violation of a well-settled rule to hold that the former decision is of no affect, and to permit a question once litigated and determined to be tried over between the same parties in a different proceeding. The principle of the rule as to *res adjudicata* (except in cases of mere motions incidental to an action) has no reference to the form or the object of the litigation in which the particular fact is determined, which is thenceforth to be deemed established as between the parties to the dispute. It does not affect the operation of the rule as now invoked that the fact that the petitioner has made a fraudulent disposition of his property was adjudicated in a proceeding to obtain a discharge from imprisonment on *mesne* process under the fifth article to which proceeding all his creditors were parties, while this proceeding is designed to effect his discharge from imprisonment on final process under the sixth article, and the execution plaintiff is alone a party to it. The creditors oppose, under the fifth article, severally, each for himself in his own right, and each is entitled to the benefit of the results of the litigation whether other creditors share in them or not. In both proceedings the petitioner is bound to satisfy the court that he has made no disposition of

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his estate with intent to defraud his creditors; that is the principal issue in both proceedings, the issue has once been fully and fairly tried and determined against the petitioner; but that adjudication goes for naught and the litigation which was terminated by it is useless, if the same or any judge may re-examine, in another proceeding, the same question. The most important decisions in this state as to *res adjudicata* illustrate the principle that the form or object of the prior litigation does not alter the conclusive effect of the judgment or decision; thus judgment by a justice in summary proceedings is conclusive in an action for rent of the premises, where the question as to letting, hiring, term, rent and amount in arrears is identical in the proceeding as well as in the action (*Brown* agt. *The Mayor*, 66 *N. Y.*, 391, and many cases cited; *Powers* agt. *Witty*, 43 *How.*, 352; *Yonkers and N. Y. F. I. Co.* agt. *Bishop*, 1 *Daly*, 449). There the object of the proceeding and the object of the action are wholly distinct, and the tribunal, practice and form of procedure are different; but the fact litigated is identical in both, indispensable in both, and the determination in the one first tried conclusive.

Such should be and is, in my opinion, the effect of adjudications upon material issues in these and similar proceedings (*Matter of Rosenberg*, 10 *Abb. [N. S.]*, 450; *Matter of Thomas*, *id.*, 114; *Matter of Roberts*, 10 *Hun*, 254). The reversal by the court of appeals does not affect the point decided. If, therefore, the proceedings heretofore taken by the petitioner to obtain exemption of his person from imprisonment were regular and the judge had jurisdiction, the adjudication in them is, until reversed or vacated, conclusive upon the petitioner, and, unless objection to the regularity of the proceedings can be urged, the plaintiff is entitled to an order denying the petition now presented.

Matter of Finck.

SUPREME COURT.

In the Matter of EUGENE FINCK an imprisoned debtor.

Discharge of imprisoned debtor — when it will be denied.

Where, upon the examination of the petitioner, an imprisoned debtor, in the proceedings for his discharge from imprisonment, it appears that his proceedings have not been "*just and fair*" towards a creditor under whose judgment he is imprisoned:

Held, that the petition should be denied.

Proceedings which are not "just and fair," within the meaning of the statute, explained.

Special Term, February, 1880.

Mr. Sullivan, for plaintiff.

Mr. Hubbard, opposed.

VAN VORST, J. — The judgment, upon which the execution was issued under which the defendant is imprisoned, does not materially involve the petitioner in any moral guilt or establish that his proceedings have not been just and fair. It is true that the complaint in the action charged the defendant with having wrongfully converted the plaintiff's bonds, and with fraud and deceit in respect thereto; yet, in the end, the learned judge before whom the trial was had, held that the defendant was liable as a partner with Bushnell, who had tortiously taken the bonds, and that the position of Bushnell was the position of the defendant, the present petitioner, and that he was answerable for the wrong of which his partner had been guilty.

The judge, while directing a verdict for the plaintiff, stated that it was not necessary to intimate any opinion as to whether or not the defendant was cognizant of the acts of Bushnell, or had any knowledge that Bushnell had tortiously taken the

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bonds. But the evidence given upon the trial has been submitted to me with the view of showing that it involves the petitioner personally in Bushnell's guilt, and that for such reason his proceedings are neither just nor fair. I have carefully read this evidence and the entire proceedings of the trial. The defendant, on the trial, denied any knowledge at the time of the transactions of the tortious act of Bushnell or that he knew that the bonds in question used by Bushnell were the property of the plaintiff; and while with respect to that portion of the inquiry I should hesitate to say that the facts and circumstances disclosed on the trial make out such a clear case against the prisoner as to deprive him of the benefit of the statute under which his present proceedings have been instituted, yet that evidence and the petitioner's subsequent examination disclose facts, the particulars of which will be presently stated, which constitute a bar to this application.

On the 28th of April 1878, the petitioner, upon the order and direction of Bushnell, received from Mr. Des Marets, the broker with whom the bonds had been deposited by Bushnell to be held as collateral security for certain stock transactions and for the purposes of raising money to be used in stock operations, the sum of \$6,818.40.

That amount he claimed as his proportion of certain profits which he stated had been realized in the purchase and sale of stocks which he had made by the authority of Bushnell. These profits, if any, were the fruits of speculations based upon the bonds as security, and the moneys paid to petitioner were in fact realized from them.

These moneys in law and equity belonged to Mr. Butler, the owner of the bonds.

If these moneys were received by the petitioner in good faith and in ignorance of Mr. Butler's rights, he would be guiltless of moral wrong whatever legal liability he incurred. But within a month thereafter Bushnell absconded and his guilt was publicly known.

He wrote a letter, dated the twenty-eighth May, acknowl-

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edging his own guilt, but declaring the innocence of his broker and the petitioner.

From the time Bushnell's flight was known petitioner is chargeable with knowledge of his guilt. It was clearly his duty, so soon as he was advised of this fact, to make what reparation he could to repair the loss of Mr. Butler, occasioned, in part at least, by his action in prolonging and directing the stock transactions which absorbed the bonds in question. He made no movement in that direction.

On the twenty-eighth June his attention was directly called to this subject by Mr. Butler, who asserted a claim to these moneys as arising from his securities, of which he had been despoiled by Bushnell, his former clerk.

The petitioner himself claimed to be entitled to these moneys, and insisted that he should not be questioned about them, and stated that he had used and appropriated them as he pleased. Upon his examination in this proceeding the petitioner stated that he had spent the money. Some \$3,500 he lost in stock speculations in "bucket shops," so called; the residue he has expended upon himself and family.

The examination indicates that these moneys were expended after the petitioner was advised of Bushnell's guilt, and some considerable portion of it after his interview with Mr. Butler on the twenty-eighth of June.

He could not pursue such course and still claim to be guiltless. He could not use these moneys, with knowledge of Bushnell's crime, and be clear of responsibility. Such use by him constitutes an adoption of the wrong and characterized his proceeding as unjust and unfair, and deprives him of the right to be released from imprisonment under the statute in question (*See article 6, title 1, chapter 5, part 2, of the Revised Statutes, sections 1-17*).

Judge J. F. DALY has, in a clear and satisfactory opinion, rendered *In the matter of the application of Andrew S. Roberts*, in the court of common pleas (*ante*, 136), discussed the question, the substance of which has been above consid-

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ered, and has defined the term "just and fair," as used in the statute, and has determined to what acts and proceedings of the petitioner they are applicable.

The principles of that decision, which I approve, are fatal to this application, and the plaintiff in the judgment is entitled to an order denying the petition now presented.

N. Y. COMMON PLEAS.

In the Matter of FOWLER, an imprisoned debtor.

Imprisoned debtor — what must be shown to prevent discharge — Meaning of "just and fair" — When entitled to discharge — 2 Revised Statutes, chapter 5, title 1, article 6.

On an application to discharge a person from imprisonment in custody upon final process, what is required is that the proceedings of the debtor have been "just and fair" in respect to the matters that he is required to swear to in the affidavit upon presenting his petition. They relate to the inquiry whether he has made any such disposition of his property, as in the affidavit he is obliged to swear that he has not; or, in other words, whether the judge is satisfied that the statement made in his affidavit is true, in respect to which the fullest inquiry may be made by the oral examination of the prisoner, under oath, as well as the examination of his wife, or of any witnesses which the creditor has to offer.

There is nothing in the provision of the statute which would authorize holding that a debtor cannot be discharged because he made a false or fraudulent representation as to the solvency of a person to whom credit was given by the person who has recovered a judgment for damages against the prisoner, for the injury thus sustained.

Nor is the fact that he applied for his discharge as a bankrupt any such disposition of the property as is contemplated by the act; for whatever property he possesses, under such a proceeding, goes to his creditors. (*This would seem to be adverse to Matter of Roberts, ante, 136, and Matter of Finck, ante, 145.*)

General Term, April, 1880.

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William C. Holbrook, for appellant.

George W. Van Slyck, for creditors.

DALY, *Ch. J.* — I fully concur in the conclusions arrived at by judge VAN HOESSEN. Before the passage, in 1831, of the act to abolish imprisonment for debt, no distinction was made between the fraudulent and the honest but unfortunate debtor; but both were alike subject to arrest and imprisonment for the non-payment of their debts. In the language of chief justice SAVAGE, in *Townsend agt. Morrell* (10 *Wend.*, 581), “previous to the passage of that act, all debtors who had been held to bail must, by the theory of our laws, have been stripped of their property by a writ of *fiери facias* before they could be imprisoned, and they were then to be imprisoned, not because they would not pay, but because they could not—a state of things exhibiting in the most glaring point of view the inhumanity as well as the impolicy of imprisoning an honest debtor.”

The act of 1831, therefore, commonly called the Stilwell act, forbids the arrest or imprisonment of any person upon civil process in any suit or proceeding instituted for the recovery of money founded upon contract, or for damages for the non-performance of one, except in certain cases—such as the contracting of a debt fraudulently, or the removal or disposition of property with intent to defraud creditors—and provided for a warrant in such exceptional cases; and for a course of procedure by which the property of the fraudulent debtor, if he had any, could be secured and applied to the payment of the judgment, if one existed or should be recovered; or if he had no property, for his discharge as an insolvent debtor, under what was known as the Fourteen Day act, which is now the sixth section, first article, chapter 5 of the second part of the Revised Statutes.

The Fourteen Day act, which was passed in 1789, and re-enacted with modifications on the 24th of March, 1801, was

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passed for the purpose of mitigating the severity of the previous law, by which if a debtor had no property to satisfy the debt he was imprisoned upon final process after the recovery of judgment, and after the issuing and return of an execution against his property unsatisfied; and had to remain in prison until the debt was paid, for there was no other means for his release, nor even any provision for his maintenance and support whilst in prison. The harsh severity of the law, in this respect, may be illustrated by a declaration of justice HYDE in *Many* agt. *Scott* (1 *Mod.*, 132), which I have heretofore had occasion to quote in the *Matter of Andriot* (2 *Daly*, 36), which was in these words: "If a man be taken in execution and lie in prison for debt neither the plaintiff, at whose suit he is arrested, nor the sheriff who took him, is bound to find him meat, drink or clothes; but he must live on his own or on the charity of others, and if no man will relieve him, let him die in the name of God, says the law, and so say I."

The act of 1801 provided for the absolute discharge of a defendant, imprisoned upon an execution for a debt not exceeding twenty-five dollars, after he had been imprisoned for thirty days; and the fourth section provided that a debtor imprisoned upon final execution for a sum not exceeding \$500, or who should have remained in jail for the space of three months upon an execution for a sum not exceeding \$2,500, and, in the language of the act, if the debtor imprisoned should "in either case be minded to deliver up to the creditor or creditors who shall so charge him in execution all his estate and effects towards satisfaction of the debt or debts with which he stood charged" that he might petition the court, accompanying his petition with the true account of his estate as it existed at the time of exhibiting his petition, giving, also, fourteen days' notice to the creditor by whom he was charged in execution of the time and place when the prisoner would make his application to the court; upon which the court, upon the appearance of the prisoner on the day stated, should, if he thought proper, tender to him an oath that the

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account set forth in his petition was in all respects just and true; that he had not at any time or in any manner or way whatsoever disposed of or made over any part of his estate, real or personal, in law or in equity, with the view to the future benefit of himself or family, or with the view or intent to injure or defraud any of his creditors; and the act then declared that if the court should be satisfied that the proceedings on the part of the prisoner were just and fair, that they should then immediately order an assignment of the estate, the account of which was contained in the petition, for the benefit of the creditor who had charged the prisoner in execution, and that upon the prisoner executing the assignment that he should be discharged from custody.

This act made no distinction between the honest but unfortunate and the fraudulent debtor, but either was entitled to be discharged if they complied with its provisions. The purpose of it was to discharge the debtor from imprisonment, if, in the language of the act already quoted, he "was minded" to deliver up all his property to the creditor that it might be applied to the satisfaction of the debt, and did so; it appearing that he had not disposed of any part of it at any time with a view to the future benefit of himself or of his family or with intent to defraud his creditors, and which he was obliged to declare on oath that he had not, if the court required it, which in practice it invariably did. The act precluded no debtor, after three months' imprisonment on final process, from the benefit of the act unless one who had disposed of his property for the future benefit of himself or his family or with an intent to defraud his creditor, and in this respect, but in this alone, distinguished the honest but unfortunate debtor from one who had fraudulently sought to evade the payment of his debts by dishonestly making away with his property. The provision of the act that the court should be satisfied that "the proceedings on the part of the prisoner were just and fair," meant that it should be satisfied that the proceedings in this respect, that is, in respect to his

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property, had been just and fair; whereupon, by the language which follows, the court was then immediately to order the estate contained in the account presented by the petition, or so much of it as might be sufficient to satisfy the creditor, to be assigned in the manner provided by the act, which, when done, the prisoner was to be discharged by the court from custody. The act further provided that if the creditor should not be satisfied with the prisoner's oath, and desired further time to inform himself, that a future day should be assigned for the hearing of the parties, and unless the creditor should then be able to satisfy the court that the proceedings on the part of the prisoner were not just and fair, the assignment should be ordered and the prisoner discharged.

This act of 1801 was again modified by the act of April 9, 1813 (1 *Revised Laws of* 1813, 348), and incorporated, with further modifications, in the Revised Statutes; but none of those modifications affect in any way the purpose of the act as respects the proceedings which were required to be just and fair. The Revised Statutes provided a further means of testing the truth of the affidavit which the prisoner is required to make by allowing the court to examine the prisoner himself, his wife, or any other person, on oath, on the day appointed for hearing, and determine in a summary way the proof and allegations of the parties.

I have had a great deal of experience in applications of this kind. Innumerable petitions have been made to this court during the time that I have been in it, for the discharge of persons from imprisonment, in custody upon final process, and the construction uniformly given, over a long number of years, by myself and my colleagues, has been that what is required is that the proceedings of the debtor have been just and fair in respect to the matters that he is required to swear to in the affidavit upon presenting his petition; that they relate to the inquiry whether he has made any such disposition of his property as in the affidavit he is obliged to swear that he has not; or, in other words, whether the judge is

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satisfied that the statement made in his affidavit is true, in respect to which the fullest inquiry may be made by the oral examination of the prisoner, under oath, as well as the examination of his wife, or of any witnesses which the creditor has to offer. This is the construction given to the statute in *The People agt. White* (14 How., 500), in which Mr. justice E. DARWIN SMITH says — as I have repeatedly said in these cases — that the affidavit which the prisoner is required to make is a key to the meaning of the words that the judge is to be satisfied that the proceedings on the part of the prisoner have been just and fair; that it must appear, as judge SMITH says, “that the affidavit is true in its letter and spirit, or the proceedings of the applicant cannot be just and fair within the sense and meaning and true intent of the statute.” The only difference in the construction of the statute, until the recent decision in the case of *Roberts* at the special term, referred to in the respondent’s points, is that judge SMITH, in the case above referred to, and judge INGRAHAM, in the dissenting opinion *In the Matter of Watson* (2 E. D. Smith, 429), is that nothing in the shape of property or interest in property, legal or equitable, existing at the time of the application shall be kept back or withheld from creditors; that this is the condition upon which the law interposes to discharge the debtor from imprisonment — a construction in which judge WOODRUFF and myself did not concur, as, in our opinion, it was engrafting upon the affidavit what was not contained in it — and that any disposition by the debtor of his property made with the intent to defraud existing creditors, was what the affidavit meant; and that the statute intended that any such disposition on the part of the debtor, or any disposal of his property for the future benefit of himself or family, after his application, precluded him from the benefit of the act, a construction which has since been sustained *In the Matter of Brady* (8 Hun, 437), which was affirmed by the court of appeals (69 N. Y., 215); and these cases, I think, may be relied upon as sustaining the view that his proceedings are

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not just and fair where it appears that he has done any of the acts which by the affidavit he swears he has not done, the sole subject of the statute, as stated by judge EARL, who delivered the opinion of the court of appeals, being the discharge of honest debtors who made an honest and full surrender of all their property for the benefit of all their creditors.

This is, as I have always held, the full scope and intent of this act from its first incorporation in the statutes, and in its several modifications in 1804, 1813, and in the Revised Statutes, and there is nothing in any of its provisions which, in my opinion, would authorize holding that a debtor cannot be discharged because he made a false or fraudulent representation as to the solvency of a person to whom credit was given by the person who has recovered a judgment for damages against the prisoner for the injury thus sustained. Nor is the fact that he applied for his discharge as a bankrupt any such disposition of the property as is contemplated by the act; for such an application is not a disposition of property for the future benefit of himself or family, or to defraud creditors; for whatever property he possesses, under such a proceeding, goes to his creditors. In addition to which there is the fact that he had no property to pass under his assignment in bankruptcy, and the only effect of his application would be to discharge him from his debts.

I think, for these reasons, that the order below should be reversed; that the defendant may be at liberty to renew his application for his discharge from custody.

Order reversed, with costs, and petitioner allowed to renew his application for discharge from imprisonment.

J. F. DALY dissents, for the reasons stated in his opinion *In the Matter of Roberts* (*ante*, p. 136); opinion of VAN VORST, J., *In Matter of Finck* (*ante*, p. 145).

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SUPREME COURT.

CORNELIUS BRINKERHOFF agt. SARAH S. PERRY.

Appeal — Stay of proceedings — Res adjudicata.

A stay of proceedings will be granted to enable a party to review an order denying an application to make a pleading more definite and certain. Where, in respect to the original pleading, the general term entertained an appeal from an order of special term denying an application to compel plaintiff to amend by making more definite and certain, and ordered that the complaint be so amended:

Held, the presumption is that such appeal was properly entertained and that the general term will entertain a second appeal in the same case.

Special Term, May, 1880.

MOTION and reargument under an order staying proceedings pending appeal to general term.

Plaintiff, in his amended complaint, alleges that his former wife, the defendant, received from him about the year 1863, property, both real and personal, to the amount of \$118,648. That such property was conveyed to her in trust when plaintiff was unable to manage it by reason of excessive drinking. Under an order of the general term plaintiff amended his complaint and set out many items of the property alleged to have been so transferred, and then adds in his amended complaint the following: "And other personal property which it is impossible for plaintiff to remember at this time." He demands an accounting and specific performance in the return of the property. Defendant applies for an order directing more definiteness and certainty which the special term refuses to grant. Defendant appeals and obtains a stay of proceedings. A reargument is allowed and the point taken that the order of special term denying an application is not appealable to the general term.

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George W. Wilson, for plaintiff. The order is not appealable (*Gies* agt. *Loew*, 15 *Abb.* [*N. S.*], 94).

Chauncey B. Ripley and *Samuel Jones*, for defendant.

I. The order is appealable, and it has been so adjudicated by the general term of this court and by the common pleas general term (*Sprague* agt. *Dunton*, 14 *Hun*, 490, 492; *Arietta* agt. *Morrissey*, 1 *Abb.* [*N. S.*], 439). Compare *Winslow* agt. *Ferguson* (1 *Lans.*, 436); *Jeffras* agt. *McKillop & S. Co.* (2 *Hun*, 353); *Livermore* agt. *Bainbridge* (47 *How.*, 353); *Gray* agt. *Fisk* (53 *N. Y.*, 630); *Gowdy* agt. *Poullain* (2 *Hun*, 218); *Brinkerhoff* agt. *Perry* (*MS.*, see note, below).

II. This court has refused to follow *Gies* agt. *Loew*, a superior court case, decided in 1873 (15 *Abb.* [*N. S.*], 94), and so held expressly in *Sprague* agt. *Dunton* (14 *Hun*, *supra*, p. 492). The cases cited above are there referred to approvingly in support of the appealability of orders akin to the one under consideration.

III. The question of appealability is one for the court above to determine.

DONOHUE, *J.* — The general term on the former motion have reviewed the question.* I am bound to suppose they decided it within their power, and will do so on this appeal.

Motion for stay granted, with costs.

* This same case was before the general term, first department, and decided February, 1880. It has not been previously reported. The case as there presented was as follows:

Appeal from an order of special term denying defendant's application to compel plaintiff to make his complaint more definite and certain.

Plaintiff brought this action against defendant who was formerly his wife. The (original) complaint alleged in general terms that about seventeen years ago he transferred to defendant, while she was still his wife, "all his property;" "a large fortune;" "valuable real estate," "by deed and otherwise," "the same being valued at said date at the sum of eighty thousand dollars," and demanded an accounting and the return of his property. Plaintiff claimed in his complaint that he was an inebriate at

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the time of the transfer, and that he was unduly influenced by his said wife and her father, one George S. Perry.

The special term having denied an application for particulars, and also a motion to make the complaint more definite and certain, defendant appealed from the order so denying relief, and urged that she was entitled to one remedy or the other.

The general term required plaintiff to amend his complaint.

Chauncey B. Ripley, for appellant.

George W. Wilson, for respondent.

Per Curiam.— We think the order should, in this case, be modified, by requiring the plaintiff to state in the complaint the specific real estate which he claims to have conveyed to the defendant, and the kind and quantity of personal property, if he claims to have conveyed any such property to her.

Ordered accordingly.

NOAH DAVIS, P. J., and BRADY and BARRETT, JJ.

SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK agt. HENRY D.
DENISON, JAMES J. BELDEN, A. CALDWELL BELDEN and
THOMAS GALE.

Counter-claim — in action by the state — a defendant cannot recover judgment for his counter-claim against the state.

By the report of the referees, to whom this cause was referred, a judgment was recovered and duly entered in favor of the plaintiffs for \$899,208.43. An appeal was taken from this judgment by the defendants to the general term of this court who reversed said judgment and ordered a new trial, with costs to abide event. The plaintiffs appealed to the court of appeals, stipulating in such notice of appeal as follows: "And the plaintiffs hereby stipulate and consent, that if the said order hereby appealed from is affirmed, judgment absolute may and shall be rendered against the plaintiffs and appellants." The *remittitur* from the court of appeals declared that, after hearing counsel for the parties, and after due deliberation had thereon, they did order and adjudge that the order of the general term appealed from in this action to this court be and the same is hereby affirmed, and judgment rendered absolute for the defendants on stipulation, with costs.

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An order of this court was made and entered which, after reciting the previous proceedings, says: "And the said plaintiffs having in their notice of appeal stipulated and consented that if the order appealed from should be affirmed that judgment absolute should be rendered against them, the said court of appeals having affirmed the order of the said general term, and directed judgment absolute in favor of the defendants on stipulation: ordered that the judgment of the court of appeals be and the same is hereby made the judgment of this court." Under these orders the clerk of Albany county entered a judgment against the plaintiffs and in favor of the defendants "for the sum of \$95,382.45, the amount of their counter-claim, and \$6,507.14, as and for their costs in this action, amounting in the aggregate to \$101,899.59. On motion by plaintiffs to vacate the judgment for the amount of the counter-claim: *Held, first*, that even prior to the act of 1876, which established a state board of audit, there was no authority either by a suit against the state, or in one instituted by it to enforce a claim against it. *Second*. Since the act of 1876, creating "*a state board of audit*," it matters not whether a suit is brought against the state to recover a supposed debt, or whether it is set up in an action brought by the state by way of set-off or counter-claim, that supposed debt is within the broad words of the act, "*all private claims and accounts against the state*," and must, therefore, be submitted to the special tribunal created by it. *Third*. Unless this state has authorized a set-off of an independent claim against itself in an action which it has brought, and has further authorized an affirmative judgment, the judgment in this action cannot be upheld. *Fourth*. The set-off and judgment are not authorized by 3 Revised Statutes (8th ed., page 860, section 18). *Fifth*. If this action had been between private individuals the judgment for the counter-claim could not be upheld, as there is no judgment or order of any court warranting or directing it. Where an order granting a new trial to the defendants is affirmed in the court of appeals, such affirmance and the direction for "judgment absolute upon the right of the appellant," without any further or other direction does not authorize the clerk of the county, in which judgment is to be entered, to include therein a demand made against the plaintiff for an independent claim, when the right thereto has never been adjudicated in his favor, and when no judgment, which has been rendered, necessarily involves its merits.

Albany, Special Term, May, 1880.

MOTION on behalf of plaintiffs to vacate a judgment docketed and entered in Albany county against the plaintiffs on

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the 28th day of April, 1880, in favor of the defendants for the sum of \$95,380.45, the amount of the counter-claim set up in the answer in the above-entitled action.

Hamilton Ward, attorney-general, for plaintiffs and motion.

Wm. C. Ruger, for defendants and in opposition.

WESTBROOK, *J.* — By the report of the three referees (James Emott, Charles O. Tappan and Isaac Lawson), to whom this cause was referred, made on the 28th day of December, 1877, a judgment was recovered and duly entered in favor of the plaintiffs on the 17th day of January, 1880, for the sum of \$387,109.64 damages and \$12,093.78 costs, making a total of recovery for damages and costs of \$399,203.42.

On the 24th day of January, 1878, an appeal was taken from this judgment by the defendants to the general term of this court, held in and for the third department, which court on the 26th day of November, 1879, reversed said judgment and ordered a new trial with costs to abide event.

On the 3d day of January, 1880, the plaintiffs appealed from the decision of the general term to the court of appeals, stipulating in such notice of appeal as follows: "And the plaintiffs hereby stipulate and consent, that if the said order hereby appealed from is affirmed, judgment absolute may and shall be rendered against the plaintiffs and appellants." The notice of appeal and stipulation is signed "Hamilton Ward, attorney-general, for the appellants."

The *remittitur* from the court of appeals is dated April 6, 1880, and it is therein declared, after a recital of the appeal to that court, that the court of appeals, after hearing counsel for the parties, "and after due deliberation had thereon, did order and adjudge that the order of the general term of the supreme court appealed from in this action to this court be and the same is hereby affirmed, and judgment rendered absolute for the defendants on stipulation, with costs."

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An order of this court, made on the 6th day of April, 1880 (the date of the caption of the order, February 6, 1880, is evidently erroneous, as it is prior to that of the *remittitur*, and the date of the filing is April 6, 1880), after reciting the previous proceedings, says: "And the said plaintiffs having in their notice of appeal stipulated and consented, that if the order appealed from should be affirmed, that judgment absolute should be rendered against them; the said court of appeals having, on the 6th day of April, 1880, affirmed the order of the said general term, and directed judgment absolute in favor of the defendants on stipulation: Now, then, on reading and filing the *remittitur* from the said court of appeals, and on motion of Wm. C. Ruger, of counsel for the respondents, it is ordered that the judgment of the court of appeals be and the same is hereby made the judgment of this court."

Under the orders which have been given, the clerk of Albany county entered a judgment on the 28th day of April, 1880, against the plaintiffs and in favor of the defendants "for the sum of \$95,382.45, the amount of their counter-claim, and \$6,507.14 as and for their costs in this action, amounting in the aggregate to \$101,899.59."

The judgment for the counter-claim the attorney-general now moves to vacate as being unauthorized by any order of the court, and as otherwise illegal and improper. So much of the notice of motion as objected to certain items of costs allowed by the clerk was abandoned, and the only question now in issue is the legality of the judgment for the counter-claim. For the purpose of presenting one point, which the motion involves more sharply, the exact words of the stipulation given in behalf of the plaintiffs on their appeal to the court of appeals, with that of the *remittitur*, and also that of the order of the special term of this court, making the judgment of the former that of the latter, have been detailed. From that statement it distinctly appears, that neither the court of appeals nor the supreme court has expressly ordered judgment for the counter-claim, and the authority of the

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clerk of Albany county to enter it must depend upon statutory enactments. To the consideration of the legality of that judgment, the discussion will be at once directed, without any embarrassment founded upon any order or decision directly allowing it.

The first and perhaps the principal objection to the validity of the judgment is that it is against a sovereign state, which has never authorized the bringing of suits against itself in its own courts for the recovery of any debt or obligation supposed to be owing by it, but which, on the contrary, only four years ago (*chapter 444 of the Laws of 1876*), created "A State Board of Audit," to whom both the "duty" and "power" were confided "to hear all private claims and accounts against the state (except such as are now heard by the canal appraisers according to law), to administer oaths and take testimony in relation thereto, to determine on the justice and amounts thereof, and to allow such sums as it shall consider should equitably be paid by the state to the claimants." A consideration of the language of the act to which reference has just been made, impresses us with its sweeping effect. There is no exception, no limitation whatever. It is expressly made, as already said, the "duty" of the tribunal by that act created, and the "power" to do so is also conferred, to hear "all private claims and accounts against the state" (except as therein excepted, and the claim of defendants is clearly not within the exception), and after hearing evidence in any case, "to determine on the justice and amount thereof." The legislative intent could not, it seems to me, be made more manifest, for that statute is a clear and distinct enactment in the form of a law, that the state is unwilling to submit its sovereignty to the jurisdiction of courts for the enforcement of claims against it, and that if any language has been used in any previous law which is capable of that construction, it must now at least be deemed to be modified in conformity with this recent declaration of its will. It matters not whether a suit is brought against the state to recover a sup-

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posed debt, or whether it is set up in an action brought by the state by way of set-off or counter-claim, that supposed debt is certainly within the broad words of the act, "all private claims and accounts against the state," and must therefore be submitted to the special tribunal created by it.

Apart, however, from the objection founded upon this statute which makes the presentation of "all private claims and accounts against the state" to the board of audit a necessity, there is still another and that is, that there can be found no warrant for the recovery of any such demands in this court either by action against the state, or by interposing the same as a set-off in one brought by the state. In either, as the aid of the courts is invoked to enforce, as there was in this case, an affirmative claim against the sovereign power — the state — there must be jurisdiction expressly and plainly conferred to enable legal tribunals to pass upon such claim and to render judgment thereon. This doctrine, so clearly and logically deducible from the fundamental thought that the Created Being can exercise no authority over its Creator, except what the latter voluntarily confers, has been repeatedly declared in carefully-considered cases both in this country and in England, to some of which in this country reference will now be made.

In *Commonwealth* agt. *Matlack* (4 *Dallas*, 303), an action brought by the state to recover from the defendant, who had been clerk to the senate during several sessions, certain moneys, which he had received to disburse for its contingent expenses, it was held that no set-off could be allowed. On the trial of that action, "the defendant proved that he had expended considerable more money than he had received for the use of the house; and he claimed a verdict for the amount of his advances as well as for the additional compensation allowed by the act of 1794. But, after argument, the court declared that the defendant could not indirectly recover from the state, a substantive, independent claim by way of set-off, any more than he could directly recover a debt due from the state, by bringing a suit against her. That the present action

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was brought to compel an account for money received for the use of the senate, in which the defendant, if he proved that the money received was so applied, would be entitled to a verdict ; but that even then, he could not be entitled to a verdict for the amount of his advances, which the senate alone was competent to allow."

In *White et al. agt. The Governor* (18 *Alabama*, 767), it was held that a set-off was not allowable in an action brought by the state, and that the general statutes in regard to set-off were not applicable. The court (*page* 769) say: "By the established rules of interpreting statutes, as recognized by the common law, the government would not be embraced by those statutes, prescribing remedies for the citizens, in matters affecting the interest of the state, unless named in the statute to be bound, and it has been expressly held in England that the statute of set-off does not apply to the government, although that statute is couched in as general language as our own (*See Broom's Legal Maxims*)."

In *State agt. Baltimore and Ohio Railroad Company* (34 *Maryland*, 344), an action for money had and received, the defendant in its second plea pleaded a set-off and a claim against the state. To this plea there was a demurrer, and the court (*page* 374) said: "Upon the questions raised by the demurrer to the second plea, we concur in the ruling of the superior court. In actions instituted by the state, it is well settled that no right of set-off exists, unless in cases where such defense is expressly allowed by statute, for the reason that the state being sovereign, is not liable to be sued by an individual or corporation."

It can scarcely be necessary to multiply authorities in support of a principle, which, apart from any decisions, would seem to be elementary. *Commonwealth agt. Rodes* (5 *T. B. Monroe, Kentucky Reports*, *page* 318); *Chevallier's Administrators agt. The State* (10 *Texas*, 353), and *Raymond agt. The State* (54 *Miss.*, 562, also reported in the 28th *American Reports*, 382), are equally in point ; and even though a set-off

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against the sovereignty is allowed by statute to be pleaded, the supreme court of the United States has expressly decided (*United States agt. Eckford*, 6 *Wallace*, 484), that "no judgment for any ascertained excess can be rendered against the government, although it may be judicially ascertained that, on striking a balance of just demands the government is indebted to the defendant in such amount."

It will be assumed then as well-settled law, that unless the state has authorized a set-off of an independent claim against itself in an action which it has brought, and has further authorized an affirmative judgment therefor, that the judgment in this action cannot be upheld. So clear and well understood is this rule of law, that it was not disputed by the learned counsel of the defendants, who insisted that the set-off and judgment were authorized by 3d Revised Statutes (6th ed., page 860, sec. 13). This position will now be considered.

The statute relied upon is as follows; "Every suit or proceeding in a civil case instituted in the name of the people of this state, by any public officer duly authorized for that purpose, shall be subject to all the provisions of law respecting similar suits or proceedings, when instituted by or in the name of any citizen, except when provision is or shall be otherwise expressly made by statute; and in all such suits and proceedings the people of this state shall be liable to be nonsuited, and to have judgments of *non pros.* or of discontinuance entered against them, in the same cases, in like manner and with the same effect as in suits brought by citizens, except that no execution shall issue therein."

It will be observed that this provision of the Revised Statutes defines the course of procedure in suits or proceedings by the state, and also declares the liability which the state incurs by their initiation. The statute does not say that the people incur the same liability that a citizen does when it becomes a party plaintiff, but the "suit or proceeding * * * shall be subject to all the provisions of law respecting similar suits or proceedings, when instituted by or in the name of any

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citizen ;” and then having imposed upon the “suit or proceeding” “the provisions of law respecting similar suits or proceedings” which are instituted by the citizen, it plainly states and defines the judgments which can be rendered against the state, among which is not the right to enter one for an independent and affirmative alleged cause of action against it, but for costs only. Without this or a similar provision of law no judgment whatever could be rendered against the state, and the authority conferred cannot be extended. If the argument of defendant’s counsel is sound, that the first provision of the section which has been quoted was designed to subject the state to any liability which any suitor in its courts as plaintiff incurs, it was easy so to say in plain words, and to end the section and sentence with that enunciation. Instead, however, of doing so, in the same sentence, upon the language of which, in its commencement, the counsel bases his argument, are added the words which limit the power to enter judgment in the action or proceeding which the people initiate. To the extent of the authority granted, the courts can exercise jurisdiction, but beyond that they cannot go, for they are then interfering with sovereign rights, over which they have no control.

In *People agt. Brandreth* (36 N. Y., 191 ; also reported in 3 *Abbott’s Pr. Rep.* [N. S.], 224), at circuit and general term of this court, it was held “that in an action by the state to recover money, no counter-claim or set-off could be allowed.” The court of appeals, however, refused to pass upon that question and affirmed the prior decisions upon other grounds. The opinion of judge HUNT, though entitled to great respect, is a dissenting one, and even he does not undertake to decide that a recovery can be had against the state for any sum which it may be indebted in excess of its own demand.

The result of our examination is clear, that even prior to the act of 1876, which established a state board of audit, there was no authority either by a suit against the state, or in

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one instituted by it to enforce a claim against it. The argument, however, founded upon the statute of 1876, should not be forgotten. Even though the provision of the Revised Statutes, upon which comment has been made, could be so strained as to allow a demand against the state to be enforced as a counter-claim, yet it was capable of alteration and repeal, and the similarity of proceedings in suits and proceedings brought by the people of the state, to that in those brought by any citizen, was with the expressed exception, "when provision is or shall be otherwise expressly made by statute." That provision now exists, and as has been shown in the beginning of this opinion, chapter 444 of the Laws of 1876, which creates a "State Board of Audit" for the purpose of hearing and determining "all private claims and accounts against the state," must necessarily remit to that tribunal the counter-claim of the defendants in this action.

We are now brought to the consideration of another question, and that is, if this action had been between private individuals, could the judgment for the counter-claim be upheld? This discussion will be premised by a statement of the case, and its situation when it went to and passed from the court of appeals.

The state, on the 9th day of September, 1879, entered into a contract with Henry D. Denison to do certain work upon the Erie canal, and to furnish the materials therefor, in which the other defendants were the partners of Denison. The complaint averred that under that contract the defendant should have received only \$74,183.40; that no legal or valid change or alteration of that contract was ever made. That at various times between the 23d day of November, 1869, and 1st day of June, 1875, by false pretenses and false certificates from resident and assistant engineers, the defendants obtained several hundred thousand dollars from the state in excess of what they were legally entitled to receive under their contract. The complaint also contained a distinct averment that the "false certificates and vouchers presented by the defend-

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ants, which were procured by them from the assistant engineers and resident engineers, officers of the state, * * * were procured and obtained by the exercise of corrupt influences upon the said officers, and, among other influences, by inducing the said officers to believe that, through the great political power and influence of the defendants and their friends, the said engineers would be dismissed if they refused to sign such certificates and vouchers," and it concluded with a demand for judgment against the defendants, "for the sum of \$419,571, with interest thereon from the 1st day of January, 1870, besides costs of the action "

The answers deny all fraud, corruption and collusion of every kind. They admit the making of the original contract set out in the complaint, but aver the legal performance of work and furnishing of materials for and to the state to the amount of \$494,584.05, in actual value, which have been duly accepted by it. The payments on account thereof are detailed, and all are averred to be under legislative appropriations made for that purpose. Such payments, however, the answers claim, do not liquidate the demands of defendants in full, but, on the contrary, \$73,674.05 is charged to be justly due and owing by the state to the defendants on account of the work done and materials furnished by them, for which sum, "with interest thereon from the first day of June, 1875, with costs of this action," judgment is demanded.

To the answer of the defendants there was a reply by the plaintiffs, which distinctly put in issue the right of the defendants to recover the moneys set up by way of counter-claim, and, also, the facts upon which such right of set-off was averred to exist.

The report of the referees, to whom the action was referred to hear and decide, did not find any fraud, nor that the state had paid one dollar for work or materials in excess of their actual value, but that the alterations in the original contract, requiring more work and materials were contrary to law, and that the payments made on account of such increased work

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and materials, amounting to \$332,926, could be recovered by the state, and that the plaintiffs were entitled to a judgment for that sum against the defendants, with interest from the 30th day of August, 1875, besides the costs of the action. The report further found the sum of \$387,109.64 to be due to the plaintiffs on the day of the date thereof, which was December 28, 1877.

The judgment entered upon this report was, as has already been stated, reversed by this court at general term, and a new trial was ordered, upon two grounds: First, that the complaint being for fraud, the plaintiffs could not maintain their action without establishing it; and, second, that the voluntary payment of the money by the state precluded its recovery, without allowing at least the value of the work done and materials furnished, of which the state had the benefit. It then became a grave question for the attorney-general to decide, whether he would take a new trial and endeavor to establish upon it what the state, according to the report of the referees, had failed to prove upon the first, or whether he would seek to maintain the judgment on the ground upon which three referees — learned and able lawyers — had placed it. Either course was perilous. If he had taken a new trial and failed to prove fraud as his predecessors had failed, he would have been subject to the imputation of having needlessly subjected the state to the expense of a second trial, the necessary failure on which had been foreshadowed by the result of the first trial. If he went directly to the court of appeals and gave the stipulation required by the Code (*section* 191), and was there also unsuccessful, he was liable to be censured for throwing away the chance of success by establishing fraud on the second trial. By appealing, as he did, directly to the court of appeals, he sought, in the least expensive manner, to maintain the judgment upon the only ground on which three able and disinterested professional men thought a recovery could be had, and thus avoided the large expenditure of retrying an issue, in which they had discovered no merit.

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In the court of appeals all the judges except EARL, J., concurred in the opinion of judge FOLGER, "That the cause of action stated in the complaint was one in fraud alone, and that the referees did not find that there was fraud in the transaction." Two of the judges (MILLER and EARL) further concurred with judge FOLGER in his opinion, that some of the payments to the defendants by the canal commissioners and auditor were without authority of law, but that the referees erred in holding that the state could recover all the money thus paid without any allowance for the value of the work done, but that there was not a ratification by the legislature of the unauthorized payments. A majority of the court (CHURCH, Ch. J., RAPALLO, ANDREWS and DANFORTH, JJ.), however, held that there was a ratification by the legislature by their acts of the action of the canal commissioners and the auditor of the canal department in making payment to the defendants. Perhaps, in view of the conclusion reached by the court, it ought further to be said that in no event could a recovery have been had by the state for the moneys voluntarily paid. If the legislature has ratified payments made by officers of the state, no rule of law known to us would sustain an action to compel their payment back (*People agt. Stevens and ors.*, 71 N. Y., 527).

From the foregoing statement it appears that the grounds upon which a reversal was placed by a majority of the court were: 1st. That the complaint was in fraud, and the referees had failed to find that any was established; and 2d. That legislative enactments had ratified and confirmed the payments made to the defendants. It is clear, then, that the right of the defendants to a judgment against the state for their counter-claim rests upon no decision of any court, but only upon the stipulation given with the notice of appeal, and upon the order of the court of appeals affirming that of the general term, and directing "judgment absolute for the defendants on stipulation." It is true that the referees have found, and so the pleadings, perhaps, admit, that on each payment made

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to the defendants on account of their work and material, fifteen per cent was retained from the amount certified to be due at the time of the payment, and that the aggregate of the sums so retained with the interest added is the amount of the judgment recorded. But, while this is true, it has not been decided by any tribunal whatsoever that this money can be recovered. The power of the state officers to order the work and materials in excess of the original contract was denied by the referees, neither was it affirmed by any court, and the nearest approximation to the settling of any principle from which the right of its recovery can be deduced is to be found in the conclusion of a majority of the judges of the court of appeals, that the acts of the legislature had ratified the payments made on account thereof. Perhaps it would be safe to hold that legislative enactments ratifying payments made on account of work and materials validate the entire orders given therefor, but a plausible line of argument can be stated to prove that when a public officer exceeds his authority in making a contract, and the legislature have made appropriations out of which payments have been made on account thereof, that whilst the money actually paid cannot be recovered from the parties to whom it was given, yet the state has incurred no liability for the remainder. Without deciding this question, however, it may with truth be repeated that the liability of the state for the unpaid sums has not been adjudicated, and that the judgment, were the action one between individuals, must depend upon the effect of the stipulation, and the order rendering judgment absolute in conformity therewith.

Section 191 of the Code provides that, "an appeal cannot be taken from an order granting a new trial on a case or exceptions, unless the notice of appeal contains an assent on the part of the appellant, that if the order is affirmed judgment absolute shall be rendered against the appellant." If that section is to be construed as the defendants argue it should be, then in any case where a set-off or counter-claim is set up in

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the answer, though not proved or thought of upon the trial (and how often that occurs in practice is well known to the profession), and upon such trial the plaintiff has a recovery, which the general term reverses on appeal, under a stipulation of the character given in this case on appeal to the court of appeals, an affirmance of the order of reversal would necessitate a judgment for a counter-claim which never existed, was unproved on the trial, and only claimed *pro forma* in the answer. Can a construction which produces such a result be sound? Must a party who seeks to review a decision which overturns his right to recover, take the hazard in doing so of paying a claim against himself, the only existence of which is to be found in the pleading? It seems to me that no such result was intended by our law-makers, and that a succeeding section, as will now be endeavored to be shown, removes the difficulty.

The one hundred and ninety-fourth section of the Code provides: "The judgment or order of the court of appeals must be remitted to the court below, to be entered according to law. Upon an appeal from an order granting a new trial on a case, or exceptions, if the court of appeals determines that no error was committed in granting the new trial, it must render judgment absolute upon the right of the appellant; and after its judgment has been remitted to the court below, an assessment of damages or any other proceeding, requisite to render the judgment effectual, may be had in the latter." What does the section mean? The court "must render judgment absolute *upon the right of the appellant.*" Is there no significance in those words—"the right of the appellant?" The court is not to render an absolute judgment for every claim made by the defendant in his pleading, but upon "the right of the appellant," which the appeal involves and which the order appealed from denied him. The affirmance of the order need not deprive the defendant of any set-off or counter-claim, for that may be protected by the order of the appellate tribunal, which can make it in such form, when that is

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necessary, that the court below may direct "an assessment of damages, or any other proceeding, requisite to render the judgment effectual."

It may be argued that the view which is taken in this opinion differs from that expressed by judge EARL, in *Hiscock et al. agt. Harris et al.*, an unreported case recently decided by the court of appeals, a manuscript copy of which has been furnished me. The plaintiff in that case sought to recover upon an item in an award made in his favor. The defendants in their answer alleged that the award was procured by the fraud of the plaintiff, and asked that the "award be adjudged to be void, and that the same be vacated and set aside, and that the submission be declared to be revoked, and that the complaint be dismissed, and that they have judgment accordingly." To this answer there was a reply denying the facts upon which it was based. The referee to whom the case was referred, reported in favor of the plaintiff, and the general term granted a new trial. On appeal to the court of appeals the order of the general term was affirmed and judgment absolute ordered in favor of the defendants. No one can doubt that the effect of that order was precisely what judge EARL, in his manuscript opinion, held it to be, a judgment declaring the award void. It was the whole issue made by the pleadings, and "judgment absolute upon the right of the appellant" could mean only, what it was held to mean by the appellate tribunal, that the award must, by the judgment, be declared void. It is true that the language of the opinion of judge EARL, taken literally, may be construed to go much further, but construed by the facts of the case in which it was used, it cannot be decisive of a case like the present, in which the facts are essentially different, especially when the manuscript report of the case does not show that a majority of the court concurred in all the views which the opinion expresses.

Neither then, in *Hiscock et al. agt. Harris et al.*, nor in any adjudged case which I have been able to discover, has it

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been held that where an order granting a new trial to the defendant is affirmed in the court of appeals, that such affirmation and the direction for "judgment absolute upon the right of the appellant," without any further or other direction, authorizes the clerk of the county, in which judgment is to be entered, to include therein a demand made against the plaintiff for an independent claim, when the right thereto has never been adjudicated in his favor, and when no judgment, which has been rendered, necessarily involves its merits. So to hold would, it seems to me, often work gross injustice, and such holding is not required by any language of the Code, which can readily and easily be so interpreted as not to do any injustice, and also protect any valid demands which the defendant may have by way of set-off or counter-claim.

This opinion has already reached a length which was not intended, and the conclusions can be briefly stated.

There must be an order vacating the judgment against the state for the reasons: 1st. That the defendants cannot obtain a judgment for any debt or claim against it in this court. 2d. There is no judgment or order of any court warranting or directing it.

Various other points were made and discussed by the attorney-general upon this motion, which have not been considered, because the result of our deliberation, just stated, has made the examination thereof unnecessary.

The People *ex rel.* Ward agt. Ward.

SUPREME COURT.

THE PEOPLE *ex rel.* ELIZA A. G. WARD agt. SAMUEL WARD.

Habeas corpus— where and to whom application for the writ, in behalf of wife living in a state of separation from her husband, respecting the custody of a minor child must be made.

The supreme court at chambers or a county judge has not jurisdiction to grant a writ of *habeas corpus* upon the application of a wife, living in a state of separation from her husband, respecting the custody of a minor child.

The writ is founded upon 8 Revised Statutes (*Banks' 6th ed., page 163*), and the application *must* be made to the *supreme court*, and it must be not only granted by, but returnable before the *supreme court*.

Onondaga Special Term, January, 1879.

MOTION for writ of *habeas corpus*.

The petition of Eliza A. G. Ward showed that she was the wife of Samuel Ward. She and her husband were living in a state of separation without being divorced; there was one minor child of such marriage aged about seven months; that her husband had treated her cruelly and ejected her from the house, refusing to allow her to return or to give her the custody of the child, &c., and, therefore, prayed that the writ might issue.

Oswald Prentiss Backus, for the motion, argued in reply to the objection of the court: That the writ was founded upon the provisions of 3 Revised Statutes (*Banks' 6th ed., page 163*); that the application must be made to the supreme court, and that a justice of the supreme court at chambers, or a county judge, had no jurisdiction to grant the writ, and that it must be not only granted by, but returnable before the supreme court (*People agt. Humphrey, 24 Barbour, 521; 1 Crary's Practice, 390*).

St. John agt. Sweeney.

NOXON, J. — After considering the provisions of 3 Revised Statutes, 163, and *People* agt. *Humphrey* (24 Barbour, 521), I am now of the opinion that the writ can be granted only by the court.

Motion granted.

SUPREME COURT.

ST. JOHN agt. SWEENEY.

Party wall — what would be a proper or improper use of, not to be decided upon affidavits.

Without an agreement between the owners of property, allowing them, windows have no proper place in a party wall.

Whether the erection of fire escapes by the defendant would be an improper use of the party wall, *quære*.

Upon disputed facts, and especially such an one as the existence of an agreement as to the mode of use of a party wall for all time, the only evidence thereof being acts of parties, the court will not decide on *ex parte* affidavits.

Special Term, September, 1879.

MOTION to continue injunction.

A. J. DITTENHOFFER, for plaintiff.

VAN DERPOEL, GREEN & CUMMING, for defendant.

WESTBROOK, J. — Nothing in the shape of a formal discussion of the interesting questions in this cause will be attempted, but a simple statement of points will be given.

1st. Without an agreement between the owners of property, allowing them, windows have no proper place in a party wall. This is evident from the uses and objects of party walls, with which use windows are inconsistent. No written contract allowing them to be placed in the wall between the property of the parties, and to be there continued unobstructed is

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shown, but the existence thereof is argued from certain acts and conduct of the owners of the property, and the court is asked, on a motion, to infer due execution of such an agreement. The drawing of such an inference previous to a trial, upon facts of at least doubtful signification, would, it seems to me, be a departure from well settled rules of equity practice.

2d. There is not sufficient proof before me to justify the holding on a motion, that the erection of fire escapes by the defendant would be an improper use of the party wall.

3d. It is better that this case go to a trial, when the facts can be ascertained and settled. If the plaintiff succeeds, the erection of the defendant can be readily removed, and, as it seems to me, her damages readily and easily ascertained.

Upon disputed facts, and especially such an one as the existence of an agreement as to the mode of use of a party wall for all time, the only evidence thereof being acts of parties, it would be unsafe to decide on *ex parte* affidavits. The order to continue the injunction is denied, with costs of motion to abide event.

SUPREME COURT.

HENRIETTA H. WRIGHT agt. B. HUNTINGTON WRIGHT and
JAMES H. SEARLES.

Tenants in common — Devisees take by statute as tenants in common unless it is expressly declared to be in joint tenancy — the right to an accounting between tenants in common and to charge whatever has been received from the property by one more than his moiety upon his share as a lien.

Henry Huntington died in 1846 leaving a will whereby he gave to his daughter, Henrietta D. Wright, the use or income of a certain share of his real and personal property, to have and to hold for her life, and at her decease the said share was to go absolutely to her heirs. The said Henrietta D. Wright died in 1865 leaving two children, to wit, the plaintiff and the defendant Wright. By the will of their grandfather

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the executors and trustees were empowered to sell, convey and pay over and transfer to the different devisees their share or portion. These children took equally, share and share alike. In 1866 and 1868 the executors transferred real and personal property to the plaintiff and defendant Wright, jointly. B. N. Huntington was the acting trustee and executor. Some seven or eight years ago accounting proceedings were had and it was found that there was still coming to plaintiff and defendant Wright from their grandfather's estate \$190,000. The said executor, B. N. Huntington, made an assignment for the benefit of creditors in 1876, and a large portion of the property so assigned by him comprised the property of the grandfather's estate. All of this property, both real and personal (with some exceptions of minor importance), was transferred by B. N. Huntington's assignee to the plaintiff and defendant Wright, jointly, in part payment of what was still coming to them under the will. The defendant Wright, from time to time, received the proceeds from the joint sales of the property, which came to him and plaintiff as tenants in common from their grandfather's estate, and from the bonds, mortgages and contracts, the plaintiff uniting in the deeds, and in some instances uniting with the defendant in satisfying mortgages that had been paid to the defendant Wright, but it was agreed between the parties that the defendant should account to the plaintiff on final settlement for all the moneys received by him from this property held by them as tenants in common, and that when they received what they could from the estate the plaintiff was to have her share on final settlement of the property which came to them from their grandfather's estate. The defendant Wright has received from this joint property about the sum of \$226,888, and has paid over to the plaintiff not to exceed \$9,000. There is still remaining of this property, which stands in the name of plaintiff and defendant Wright, real estate of the value of about \$95,000, and personal property contracts, &c., to the amount of about \$10,000. On the 14th day of January, 1878, the defendant Wright made a general assignment for the benefit of creditors to the defendant Searles, who has qualified and is now acting as such assignee, and said assignee now claims to hold for the benefit of creditors one-half part of all the real and personal property now remaining in the name of plaintiff and his assignor the defendant Wright. In an action brought by plaintiff for an accounting and to have the property undisposed of set apart to the plaintiff, or that her half of what the defendant might have disposed of be declared a lien on the legal estate of Wright or his assignee in the balance:

Held, first, that where tenants in common sell and convey property and one receives the entire purchase-money the other can maintain an action for money had and received to recover his proportion of the price. So

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he can to recover his share of the rents received by the cotenant, but that will not bar his remedy for an equitable adjustment and lien.

Second. That an action of account will lie in this case. That action is in its nature equitable, although given by statute; it was before and still is a matter of equitable cognizance. It involves the idea of agency, an implied trust, and whatever remedy is appropriate in such an action can be invoked hereby by the plaintiff.

Third. That the subject of the tenancy was the undivided share of the two in the estate of their grandfather, and the fact that it was handed over to them in different parcels or by different instruments does not change the subject of the tenancy. The whole is to be considered one subject.

Fourth. That the plaintiff has an equitable lien on the share of her brother, the defendant Wright, in the balance as it now exists for her share of what her brother has received in excess of her.

Fifth. The rights of the assignee of defendant Wright are no greater than the rights of the latter would be. The assignee takes subject to all equities of third persons.

Utica Special Term, November, 1879.

W. E. Scripture, for plaintiff.

I. The rule is so well established that the defendant Searles in this action can take no greater rights than the defendant Wright had at the time of the assignment, and takes subject to all the equities between the parties, that we will not trespass upon the court by citing cases on that point.

II. Devisees take by statute as tenants in common unless it is expressly declared to be in joint tenancy (3 *Revised Statutes*, page 14, sec. 44 [5th ed.]).

III. The right of an accounting is fully recognized by courts of equity in case of partners and tenants in common (2 *Van Santvoord's Equity*, 163, 165). Same volume (page 160) the learned writer says: "An action for an accounting between partners, principal and factor, tenants in common and joint tenants, and in a great variety of other cases which it would be impossible to mention, is a well-defined branch of equity jurisprudence." In suits in equity the court administers relief according to its own notions of equity (4 *Barbour*, 229). The case of *Van Horn agt. Fonda* (5 *Johnson's Chancery*, 406) is

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a strong case showing the duties and high obligations that exist between claimants of a common subject and that an equitable adjustment will always be granted.

IV. In *Nicol agt. Mumford* (4 *Johnson's Chancery*, 526) it was held that part owners of a ship would be treated as partners as to the freight and cargo and have a lien thereon for any balance due on account thereof, but would not have a lien upon the ship itself. The case just referred to is overruled by the case of *Dunham agt. Davis* (8 *Barbour*, 90, 94) where it was held that the lien existed as to both vessel and freight whether they were considered as tenants in common or as partners. In *Williams agt. Lawrence* (53 *Barbour*, 324) it was held that an accounting could be had between the owners of a ship and cargo. *Buchan agt. Sumner* (2 *Barbour's Chancery*, 167) holds the rule to be that under the New York statutes where real estate is purchased with partnership funds the partners take as tenants in common of the legal title; that such real estate is, in equity, chargeable with the firm debts first. Second, with any balance which may be found due from one copartner to the other, and, Third; that the separate creditors of either can take nothing until such equitable adjustment (*Same rule restated at page 336 same volume; see, also, Collumb agt. Read*, 24 *N. Y.*, 505). The moment a partnership ceases the partners become tenants in common of the property, and although they are then tenants in common of the property the same equitable rights of an accounting exist, thus showing that tenants in common stand on a footing with partners (*Collyer on Partnership*, sec. 545; 2 *Barb.*, 625).

V. In this state the right to an accounting between tenants in common and to charge whatever has been received from the property by one more than his moiety upon his share as a lien is fully settled. The first leading case is *Hannan agt. Osborn* (4 *Paige Chancery Reports*, 336) where it was held that one co-tenant has an equitable lien upon the other's interest in the property where he had collected more than his

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share of the rents, and that it was enforceable against the same. In *Scott agt. Guernsey* (60 *Barb.*, 165) one of the tenants in common received all of the rents of certain real estate for a period of thirty years, or thereabouts, and the court held that the rents were a lien upon the share or interest of the co-tenant who had received them; it was also held that the co-tenant receiving the rents was liable to pay interest on the same. The court, at page 178 of this case, say: "There can be no doubt that the accounting ordered between these tenants in common was proper in this case. This is not the statutory proceeding for partition but a suit in equity, and, therefore, as the court has jurisdiction of the subject-matter and the parties in interest, it is in accordance with a well-established rule that it should do complete justice between the parties by disposing of all questions between them in relation to the land and its use. In the language of judge STORY, "the jurisdiction having once rightfully attached it shall be made effectual for the purposes of complete relief." This case is affirmed in 48 *N. Y.*, 107.

VI. Three Revised Statutes (*page 39, sec. 9 [5th ed.]*) reads as follows: "One joint tenant or tenant in common may maintain an action of account, for money had and received, against his co-tenant for receiving more than his just proportion." The remedy given by this statute to one tenant in common against another is cumulative and does not bar an equitable adjustment and accounting for moneys received for or on account of the property (*Scott agt. Guernsey*, 48 *N. Y.*, 107). This statute applies to cases when rent or payment in money, or in kind, due in respect of the property is received from a third party by one co-tenant who retains for his own use the whole or more than his proportion (*Dresser agt. Dresser*, 40 *Barb.*, 304). It will be observed from the foregoing cases that courts of equity hold that a co-tenant's interest in lands that remain at the time a bill is filed for an accounting and relief is subject to a lien for any and all moneys he has received from the property held in common.

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Take, for an example, "the case of rents received; it is made a charge upon the land out of which they are derived and directly upon that tenant's share who has received the money, although the rents are proceeds from the entire lands. If this is so, would there be equity in the position that moneys received from sales of part of the property itself should not be a lien upon the share of the tenant that had received the proceeds of the sales?"

VII. One tenant in common cannot receive more than his own moiety or share of the property (*Stevens* agt. *Rugles*, 5 *Mason* [*U. S.*] *Reports*, 221), therefore we go further in this case than the question of lien and claim that the defendant Wright has received more than his moiety or just proportion of all the property that came to plaintiff and defendant from their grandfather's estate; and if he has then he has no real interest in the property that now remains, and that the apparent interest of the defendants in this property in question should be conveyed to the plaintiff. We take, also, the position, and believe it to be just, that if Mr. Wright or his assignee should file a bill they would not be entitled to hold any part of this property as against the plaintiff.

VIII. There is still another view of this case favorable to the plaintiff. It was agreed between the parties that when they had received what they could from their grandfather's estate there was to be an accounting and plaintiff was to have her share of the entire property; under the agreement the defendant has received and the plaintiff has performed, and plaintiff is entitled to have what property there remains conveyed to her. On the point as to the power of the court to compel a specific performance we cite *Lobdell* agt. *Lobdell* (33 *How.*, 347); 2 *Story Equity Jurisdiction*, 747. Equity will sometimes refuse specific performance on the ground of *laches* and great delay, but not when the delay is by common consent and has occasioned no injury to the party complaining (*Leaird* agt. *Smith*, 44 *N. Y.*, 619), and it is immaterial whether the subject relate to real or personal estate

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(1 *Madd. Chancery Practice*, 295; 2 Story, *sec.* 717; 1 *Vem.*, 159).

IX. The defendants claim that this property came to these parties at different periods and is, therefore, independent and separate and not one subject. We answer that it is an entirety; that the property all came from one common source; that it all came by virtue of their grandfather's will, and that all of it was from the estate of Henry Huntington, and being a common subject and there being community of interest it cannot be separated; and the fact that there was an agreement between the parties that there was to be an accounting, &c., when they had received what they could from their grandfather's will makes this one entire transaction; therefore we respectfully submit that as the account between the parties has already been established in this court that the plaintiff have judgment that all of the property belongs to her and that a conveyance be decreed, or that the moneys which have been received by the defendant Wright more than his share be charged to him, and that the same be declared a lien upon the defendants' interest in the property and the property sold and the proceeds paid over to the plaintiff.

Adams, Swan & Doolittle, for defendant Searles.

Dennison & Everett, for defendant Wright.

MERWIN, J. — The plaintiff and the defendant Wright are the children and only issue of Henrietta D. Wright, who was a daughter of Henry Huntington, who died in October, 1846. He left a will by which, after providing for the payment of his debts and a specific devise to his son, Benjamin, he directed that all the rest of his estate, real and personal, be divided into five equal parts, and one of such parts he gave and devised to his executors in trust to receive the rents, profits and income thereof and apply the same to the sole and separate use of his daughter, the said Henrietta D. Wright, during

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her life, and at her death he gave and devised the said part to her issue, in equal proportions, absolutely. The executors had full power to sell and convey any of the real estate. Mrs. Wright died on 23d September, 1865. Thereafter, and in January, 1866, the said executors made a transfer of divers personal securities, amounting to about \$28,000, to the plaintiff and said B. Huntington Wright on account of their share in the estate; also another transfer of securities, as of June 1, 1866, of about \$12,000; also a like transfer in August, 1868, of about \$17,000; also a conveyance of divers parcels of real estate in July, 1866, in value then about \$42,000. After this there was a proceeding instituted in the surrogate's court against Benjamin N. Huntington, then sole executor, for an accounting which resulted in a decree which, among other things, adjudged that there was due to plaintiff and her brother from the executor, on account of their said share, about \$190,000. Huntington then made a general assignment for the benefit of his creditors, and under this the assignee made several transfers to the plaintiff and her brother of real and personal property in part payment of their judgment.

All of these transfers and conveyances were made to the plaintiff and her brother together, so that their legal estate in the property transferred in each case was that of tenants in common. The instruments were of different dates and from different persons, but were all made and received towards the payment of the same claim, that is, the share of plaintiff and her brother in their grandfather's estate. To that extent all the property was derived from the same source.

The plaintiff and her brother lived together, and the latter has always had the management of the property as it was from time to time conveyed to them. Nearly all of the securities transferred to them in 1866 and 1868 have been converted into money by him and he has used the proceeds for his own benefit; she sometimes joined in the execution of discharges of mortgages. Much of the real estate was sold, he

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doing the business and receiving the money and she joining with him in the deeds. She received from him at the rate of about \$600 a year, which apparently would be much less than half the income. Evidently she knew he received the money, but what he did with it I think it does not appear that she knew. She knew that he had it and used it. This she assented to. She probably did not know the extent to which he was using it. There seems to have been no definite arrangement between them about the management or disposition of the property. It seems, however, to have been understood between them that when the estate was settled they should then have an accounting between themselves and would divide up. She, for the time being, trusted everything to her brother.

Matters ran along in this way till after the transfers from the assignee of the executor, when B. Huntington Wright failed and made a general assignment to the defendant Searles. I infer that more than one-half in the aggregate of the property has been disposed of by B. Huntington Wright and the proceeds applied to his own use, and the question is whether the plaintiff can, in effect, have the balance for or account of her share. This action is brought for an accounting and to have the property undisposed of set apart to the plaintiff, or that her half of what the defendant Wright has disposed of be declared a lien on the legal estate of Wright or his assignee in the balance.

Where tenants in common sell and convey property and one receives the entire purchase-money the other can maintain an action for money had and received to recover his proportion of the price (*Coles agt. Coles*, 15 *Johns.*, §9); so he could to recover his share of the rents received by the co-tenant (1. *R. S.*, 750, *sec.* 9; 2 *R. S.* [6th ed], 1131, but that would not bar his remedy for an equitable adjustment and lien (*Scott agt. Guernsey*, 48 *N. Y.*, 124). The statute above cited gave an action of account or for money had and received against a co-tenant for receiving more than his just proportion.

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The statute does not say of what it shall be the just proportion, but it is left to apply generally to whatever is the subject of the tenancy. Every case in which a tenant in common receives more than his just share is within the statute; a similar statute in England is so construed (*Henderson agt. Eason*, 9 *English Law and Equity Rep.*, 340).

I have no doubt an action of account will lie. That action is, in its nature, equitable; although given by statute it was before, and still is, a matter of equitable cognizance (1 *Story's Equity*, secs. 446, 466). It involves the idea of agency, an implied trust, and whatever remedy is appropriate in such an action can be invoked here by the plaintiff.

A more difficult question to determine is, what shall be considered the subject of the tenancy.

It is claimed by the defendant, the assignee, that the property conveyed by each instrument must be considered by itself, and that plaintiff's rights or wrongs, with reference to the property in one instrument, cannot be remedied by seizing upon the property derived through another conveyance and that especially what was conveyed by the assignee of the executor in payment of the judgment cannot be affected by the state of accounts existing before then between the parties.

By the tenor of the will the share to the income of which Mrs. Wright was entitled, during her life, passed at her death to her issue in the same manner as it would had she been the absolute owner and died intestate. The share, therefore, vested in them as tenants in common, at common law as to the real estate, they would have been coparceners. The share was an unit. In process of collection it was divided into parts, such division not being occasioned by any particular act of the owners but by the exigencies of collection. The title of the whole share vested at the death of the mother, but the possession was not acquired only as, from time to time, the transfers were made from the executors or those who represented them. There was no division or settlement between the tenants; that was, by mutual understanding, put

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off until the estate was settled, until the whole share was reduced to possession, or so much thereof as was collectible. It seems to me, therefore, that the subject of the tenancy was the undivided share of the two in the estate of their grandfather and that the fact that it was handed over to them in different parcels or by different instruments does not change the subject of the tenancy. The whole is to be considered one subject.

The question then is, what are the rights of the plaintiff in the balance of the subject-matter of the tenancy.

A partner has a lien upon all the property of the partnership for the balance due him on a final settlement between the partners (1 *Story Eq.*, 675; *Buchan agt. Sumner*, 2 *Barb. Chy.*, 197, 200). The basis of this lien is an implied trust or pledge (2 *Story's Eq.*, see. 1243). The whole partnership estate is considered as set apart and held not only to pay the debts of the partnership but as security to each partner for the ultimate balance due to him for his own share of the partnership effects.

A tenant in common has a lien upon the share or interest of any co-tenant for any rents that may be due from such co-tenant (*Scott agt. Guernsey*, 48 *N. Y.*, 124; *S. C.*, 60 *Barb.*, 180; *Hannan agt. Osborne*, 4 *Paige*, 343). The reason for this rule is not given in the cases cited. The increase or rents are common property as much as the principal or the original estate. When one, therefore, takes of the increase or rents he takes a part of the common fund or property, and it may well be said that there is on his part an implied agreement to have what he has received applied on his share, or that on division he will bring it in, to the end that it may be charged to him on division, and that a court of equity works out this result through the operation of an equitable lien.

If two persons jointly purchase an estate and pay unequal proportions of the purchase-money and take the conveyance in their joint names they are deemed to purchase as in the nature of partners, and to intend to hold the estate in propor-

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tion to the sums which each has advanced (2 *Story's Equity*, sec. 1206).

Coming down to the present case I don't think it can be said that the plaintiff on any occasion when she joined with her brother in the transfer or conveyance of any of the property sold her interest in the property then conveyed to her brother. She never treated him as purchaser of her interest, or trusted to his credit for her proportion. He was her agent in the management, and it was his duty either to invest in their joint names over again or to charge to his own share. There is no evidence of any intention on the part of either that she should release her claim on the whole for her share. There was not only a community of interest between the two but the relation of agency also existed, and, therefore, all intendments would be in favor of the plaintiff. True the plaintiff assented to her brother receiving the proceeds of the sales or collections, but with the idea that when the estate was settled she should receive her share of the whole, at the least, the contrary cannot be inferred. No release of any equitable right she might have had should be inferred. A vendor's lien for the purchase-money is not waived unless security is taken. So the plaintiff's lien in equity, if she had one, should not be deemed waived in absence of proof showing any intention to waive it.

Take the case of the large judgment, I see nothing in the way of plaintiff claiming that the entire consideration of that judgment was, in fact, hers, and that as between her and her brother she would be entitled to have whatever was received on it. This would fall within the rule as to purchasers of property furnishing the consideration in unequal proportions. Nor do I see why the logic of the rule giving a lien for rents would not apply and with greater force to the receiving of a portion of the body of the estate. If B. Huntington Wright has received from the subject of the tenancy more than the plaintiff, the excess should be considered as brought in upon and before division and then charged over to him in extin-

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guishment of so much of his share of the whole. The same result is worked out by giving the plaintiff an equitable lien on the share of her brother in the balance as it now exists for her share of what her brother has received in excess of her.

Under the circumstances of this case, I hold, she has such a lien.

In this view of the case I don't see how the statute of limitations would apply.

The rights of the assignee of B. H. Wright are no greater than the rights of the latter would be. The assignee takes subject to all equities of third persons.

I do not understand it to be disputed but that B. Huntington Wright has received more than one-half. If so, very likely, the state of accounts between him and the plaintiff may be agreed on and the value of the remaining property fixed, and his half be formally transferred to her in extinguishment of so much of the balance due her.

If these things should be agreed on, no further proceedings would be necessary in order to a final decree.

If, however, those things should not be agreed on, then there should be a reference to take and state the account, also to ascertain and report the property undisposed of, with a full description thereof and its value, and the manner in which it should be sold or disposed of and report the evidence with his findings. I see no reason why, in this action, the court has not full power to finally close up and adjust the subject-matter of the tenancy and the rights of all therein. In case of reference all further questions will be reserved until the coming in of the report.

The appropriate findings or order may be settled before me on two days' notice.

Interlocutory judgment was entered in the action declaring the rights of the parties and appointing referee to state the account, &c. Upon the coming in of the referee's report the same was confirmed and final judgment was entered November 29, 1879.

Electro-Silicon Company agt. Trask.

SUPREME COURT.

THE ELECTRO-SILICON COMPANY agt. ASA G. TRASK.

Trade-mark — Injunction.

The plaintiffs coined the compound word "*Electro-Silicon*" and applied it to a polishing powder prepared by them from an infusorial deposit. They put up the powder in appropriate packages and acquired a large sale therefor.

The defendant, with a view to imitate their preparation, prepared a powder to be used for the same purpose and put it up in packages similar to those of the plaintiff and designated it "*Electric-Silicon*" and have offered it for sale:

Held, that they should be restrained.

Special Term, April, 1880.

Chase & Bestow, for plaintiff.

John A. Foster, for defendant.

VAN VORST, J. — The plaintiffs are the manufacturers of a polishing powder and have introduced it into use under the name of "Electro-Silicon." It is put up in wooden boxes, circular in form, the top and sides of which are covered with yellow-colored paper. On the paper covering, near the top, the plaintiffs have caused to be printed the name which they have given to their powder, "Electro-Silicon;" below which are words generally descriptive of their preparation and designating the uses to which it may be applied, to which is added its corporate name as proprietor and their place of business. On the sides are printed directions for its use, as, also, a more detailed account of the article itself.

This preparation is used for polishing gold and silver-plated ware and other substances where luster is required.

Plaintiff and its predecessors, through whom it claims title,

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first introduced this article into use, under the name first applied by them, "Electro-Silicon."

The combination of these words is wholly arbitrary and was coined for the purpose.

While the simple word "Silicon" is measurably descriptive of the article it is not so technically. "Electro," as a descriptive word, has no relation to the substance. It, perhaps, suggests the rapidity of movement with which the polish is applied.

"Silicon" is one of the elements and enters into many substances. The substance used by the plaintiff is an "infusorial deposit" consisting of silicon and oxygen, and may be technically denominated "silica" or "silicic acid." It contains, however, according to an analysis in evidence, nearly one hundred per cent of silicon.

The plaintiff has made the effort and has produced and introduced into the market at considerable expense a useful article which is familiarly known and much dealt in. It is known to dealers under its name, "Electro-Silicon."

Six or seven years ago the defendant, who was then in the shoe business, became interested with one Hyatt in putting up and selling an article of polishing powder called "Hyatt's Polishing Powder." But the business proving unsuccessful, and the defendant having sustained some loss, he gave it up, but kept in his possession some of the old boxes and labels which he had used in connection with the article.

About two years ago he resumed the business, with his former boxes and labels, and sent out a canvasser to dispose of it. After making some sales, his canvasser said to him "I have some calls for Electro-Silicon; I think I must have some of that."

The defendant then procured a substance from which he made a powder similar in appearance to that of the plaintiffs, and putting it in boxes covered with yellow paper, with printing thereon arranged much like that of the plaintiff's boxes, introduced it for sale under the name of "Electric-

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Silicon," printed upon the cover of the box, in a circular form, similar to that of plaintiff's arrangement. The general appearance of the boxes is much the same, and the one, to an unwary purchaser, might readily be mistaken for the other.

The witness Waterhouse, who testified upon the trial, says, in substance, that he called at the place where the defendant manufactured his article and saw him personally, and asked for "Electro-Silicon," and was handed, or referred to, the "Electric," and, in the course of a conversation which followed, in regard to the difference between the two preparations, the defendant, by way of assigning reasons for putting up "Electric-Silicon," said "he had an article called 'Hyatt's Polishing Powder' and his customers complained that it did not sell very well; it was not met favorably by the public, and some one had suggested the idea if he would get up something looking like 'Electro' he could sell it, and he got this up which is called 'Electric-Silicon' and that it would sell readily for the 'Electro-Silicon.'"

The defendant made a similar statement to the witness Bestow.

Under the evidence the defendant's article is inferior in quality to the plaintiff's and contains less than one per cent of "silicon." Such was the result of the analysis of Mr. Haberstro, an analytical chemist, who stated further that the defendant's preparation consisted principally of sulphate of lime.

From the above statement it seems reasonably clear that the defendant's preparation was designed to be an imitation of the plaintiffs, and to be sold, although an inferior article, for it. Such practices equity cannot sanction.

The form of the boxes, the color of the paper, the arrangement of the printed matter, the name "Electric-Silicon," are all suggestive of a design to fraudulently imitate the plaintiff's trade and business and to reap gain thereby; and that such was his motive is shown by the defendant's own statements.

In re Nebenzahl.

The case is clearly within the principles announced by LAWRENCE, J., in *Enoch Morgan's Sons & Co. agt. Schnachofer* (5 *Abbott's N. C.*, 265), and *Brown agt. Mercer* (37 *N. Y. Superior Ct. R.*, 265).

There should be judgment for the plaintiff enjoining the defendant, with costs.

COURT OF APPEALS.

In re NEBENZAHL and MARKS.

The right to two civil arrests for the same cause under the Code and under the Stilwell act — Non-appealability of order vacating arrest.

The court of appeals have no jurisdiction to review an order vacating an order of arrest or commitment where it appears from the order that the same was made "upon due consideration of the proofs in the matter and the affidavits upon which the warrant was granted."

The court of appeals will not look into the opinions to find matter there differing from that in the order, unless the language of the order is ambiguous and needs aid for an understanding upon which it went (*See S. C.*, 57 *How.*, 828).

May, 1880.

IN this case the defendants were arrested, under the provisions of the Code, for fraud in contracting the debt for which suit was brought, and after judgment they were again arrested under the act to abolish imprisonment for debt, upon the same grounds.

Judge LAWRENCE discharged them, for the reason that the latter arrest was unlawful, the defendants not being liable to be taken in custody twice for the same cause. The general term affirmed this decision, and the court of appeals has handed down the following opinion :

Thomas M. North, for plaintiff.

A. Blumenstiel, for defendant.

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PER CURIAM — It appears from the order made by the learned justice discharging the defendants from arrest, that it was made "upon due consideration of the proofs in the matter and the affidavits on which the warrant was granted." It appears from the order of affirmance made at general term, that no ground is stated in it on which it went. We may not say from the orders that they were not made upon the merits, and the proofs in the case had failed to satisfy the learned courts below that a case was made out for the commitment *nisi*, &c., of the defendants. When that is the case, we may not, when an order of arrest or commitment has been denied, review the order. We have no jurisdiction to do so, and must dismiss the appeal. It is true that the opinions delivered by the learned justices do not so state; but it is the law that we may not look into the opinions to find matter there differing from that in the order, unless the language of the order is ambiguous and needs aid for an understanding upon which it went (*Fischer agt. Gould, MS., June, 1880*). Before arriving at this conclusion we had somewhat the case upon the merits, and were of the strongest impression that there was no error in the action of the learned justice who gave the order, nor in the order of affirmance of the general term; but not having jurisdiction to review the case, we form no settled conclusion. The appeal should be dismissed.

Douglas agt. Haberstro.

SUPREME COURT.

ALICE DOUGLAS, appellant, agt. JOSEPH L. HABERSTRO, as
sheriff, &c., respondent.

Sheriff liable as bail, when sureties fail to justify — how exonerated — Special term, power to grant further time, after answer, to make surrender — what must be shown to entitle sheriff to such relief — Code of Civil Procedure, section 601.

By the failure of the original sureties to justify, the defendant, as sheriff, became liable as bail, and as such had the right to be exonerated on surrendering the defendant to the jail before the expiration of the time to answer in the action against himself.

The special term has power to grant him such further time, after answer, as it deems just, to make such surrender. But to entitle the sheriff to such relief, after the time for answering has expired, it is incumbent on him to show a substantial and sufficient excuse for permitting the defendant in the execution to be at large.

What is not a substantial and sufficient excuse considered.

APPEAL from an order of the Erie special term exonerating the defendant as bail in an action brought by the plaintiff herein against one William T. Warren, and discontinuing the present action.

The action against Warren was for the conversion of moneys collected by him in a fiduciary capacity. The plaintiff caused him to be arrested by the sheriff, who took from him bail, and they were excepted to and failed to justify. The plaintiff recovered judgment against Warren and issued an execution against his property, which being returned unsatisfied, she issued a body execution, which the sheriff, the defendant, Haberstro, returned "not found." That return was made on the 3d of April, 1879. The present action was commenced against Haberstro on the tenth of April. On the fifteenth of April, Haberstro again took Warren into custody and held him until the twenty-third of April, when he released him upon his giving an undertaking conditioned that he would

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at all times render himself amenable to the process of the court during the pendency of the action against him, and to such as might be issued to enforce the judgment therein. On the twenty-eighth of April, Haberstro, and the bail who had failed to justify, seized Warren and turned him over to the custody of one of the coroners of Erie county, and thereupon obtained an order, made by the special term of this court, exonerating them as bail, which order was reversed by the general term in October, 1879 (58 *How.*, 264). On being surrendered to the coroner, Warren gave him an undertaking, and was permitted to go at large. On the twenty-seventh of October, Haberstro, not having answered, plaintiff entered judgment against him by default. On the fifteenth of November, Haberstro obtained a special term order giving him leave to answer, upon an affidavit in which he swore to merits and excused his default in not answering. He noticed the cause for trial at the February circuit, 1880. It went upon the day calendar, and was placed as a preferred cause, and while it was in that position he again arrested Warren, and on the twenty-fifth of February moved and obtained the order from which this appeal is taken.

John Campbell Hubbell, for appellant.

Osgoodby, Titus & Moot, for respondent.

SMITH, J. — By the failure of the original sureties to justify, the defendant became liable as bail, and as such had the right to be exonerated on surrendering Warren to the jail before the expiration of the time to answer in the action against himself. And the special term had power to grant him such further time, after answer, as it deemed just, to make such surrender (*Code of Civil Procedure*, sec. 601). But to entitle the sheriff to such relief, after the time for answering had expired, it was incumbent on him to show a substantial and sufficient excuse for permitting the defendant in the execution

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to be at large. That, we think, he failed to do. The time to answer expired on the 30th of April, 1879, and the application to be exonerated on surrendering the defendant, was not made until nearly ten months thereafter, If it is to be assumed that the order of the special term exonerating him was a sufficient excuse so long as it was in force, it avails him nothing after it was reversed. From the last of October to the latter part of February he was without any excuse whatever, so far as the papers show. True, he alleged, in vague and general terms, that he was unable to find Warren after diligent inquiry, but he did not state specific facts. He did not disclose the nature of his inquiries, of whom made, or what information he received in reply to them. On the other hand, the opposing affidavits state positively that with the exception of four weeks, Warren was openly in the city of Buffalo from October to February, and that during that period he saw and conversed with the sheriff, his deputy, or attorney on several occasions. The course of practice pursued by the defendant in the action against him indicates very clearly that he had no intention of rearresting Warren until the suit against the sheriff was about to be forced to trial.

Although the question involved in the defendant's motion is one of discretion to a great extent, yet it is our duty to review the evidence. We have done so, and are satisfied that the defendant is without excuse.

The order should be reversed, with ten dollars costs and disbursements.

TALCOTT, P. J., and HARDEN, J., concurred. So ordered.

Murphy agt. Boston and Albany Railroad Company.

SUPREME COURT.

CATHERINE C. MURPHY, administratrix, &c., agt. THE BOSTON
AND ALBANY RAILROAD COMPANY.

*Negligence — Master and servant — Extending the application of the rule in
relation to co-servants.*

Employers who construct or repair machines are not liable to their employees who are engaged in the construction or repair of a machine upon which they are ordered to make certain repairs, provided some other workman in the same shop has so carelessly done his prior part of the work of repair as to leave the machine unfit to have any additional work done upon it, and in consequence thereof the employee who undertakes to do the last work is injured.

The general rule undoubtedly is that an employer who furnishes the machine for his servant to work with is bound to provide one safe for that purpose, but when a machine which is safe has been furnished the men who operate ordinarily take upon themselves the risk of their fellow-workman's carelessness.

When an accident occurs, not in the operation but in the construction or repair of a machine for operation, in the doing of which the party, a servant, is injured, such accident being caused by the negligence of another servant who had done a previous and different part of such work of construction or repair, the master is not then liable in damages for the injury.

Albany Circuit, May, 1880.

At the close of plaintiff's case a motion was made on the part of defendants for a nonsuit substantially as follows:

The plaintiff's intestate, a machinist employed in the machine shop of the defendant at East Albany, was killed by the explosion of a boiler of a locomotive engine belonging to the defendant while engaged in assisting to set the "pop-valve" of the same in the said shop on the 6th day of August, 1879.

Seventeen months, and again in December and January, before the accident the engine had been overhauled and repaired in the defendant's shop and reported finished. The

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tests applied in overhauling her were personal inspection and the hammer tests.

About two weeks before the explosion the engine was again taken to the said shop for repairs of defects which had been reported by the engineer who had been running it on the road. The rules and regulations of the company required all its workmen to be constantly on the watch to ascertain the need of repairs; and those of the shop commanded that the mechanics in the shop, to whom the master mechanic thereof or the foreman committed the duty of making the necessary repairs of an engine, should repair the defects reported by the engineer and carefully examine the engine to discover if any other defects existed in the same, and if there were any of an ordinary character to repair them at once, but if the same required any of considerable magnitude to report the same to the master mechanic or foreman for further instructions; that it was impracticable for the master mechanic or foreman to make personal examination of all the engines which came into the shop for repairs, and that duty was committed to the subordinates who were competent and experienced.

The evidence showed that the mechanics who had charge of the repairs to the boiler of said engine reported to the said foreman that the necessary repairs to it had been made and that the boiler was all right, and the mechanics who had charge of the repairs to the machinery of said engine reported to said foreman that the necessary repairs to it had been made and it was all right, and that the said boilermakers and machinists worked upon the engine at the same time and in the same place in said shop; that after said reports had been made under directions of the said foreman the engine was fired and steam was made in the boiler by two workmen in said shop for the purpose of making the same ready to set the "pop-valve," which was necessary in order to complete the repairs to the said engine before it was turned out of the shop for service; that after said workmen had reported the said engine ready with steam the said foreman directed Smith, one

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of the machinists who had been at work repairing said engine, to set the "pop-valve," and Murphy, the plaintiff's intestate, another machinist in said shop, to assist him in watching the fire and reporting to the said Smith the pressure of steam in the boiler as indicated by the gauge; that the "pop-valve" was to be set at a pressure of steam of 133 pounds to the square inch, which was the same pressure which the engine was carrying when it came into the shop; that the only way to set the "pop-valve" was by following the index of steam as noted by the gauge, and that the first and necessary duty in setting the same was to test the gauge by a test provided for that purpose so as to ascertain if it was right, and examine the pipe which communicated steam to it from the boiler to ascertain if it was unobstructed.

The neglect, if any, in the case as shown by the plaintiff's testimony was that of the mechanics (of whom plaintiff's intestate was one) to whom the doing of the repairs and testing the gauge, and cleaning the pipe leading from the boiler to it, was committed, in omitting the duty of thorough inspection and examination; that said mechanics worked together in the same shop, in the same circle of employment and for the same and a common purpose, which was to put the engine, which had come into the shop reported defective, in perfect repair.

The engine was examined after the explosion, and it was found that a number of stay-bolts in the right leg of the boiler were broken by rust, and the outer sheet of the boiler, through which the stay-bolts passed, was eaten away about eighteen inches in length by rust to the extent of about one-half of its original thickness at the mud ring of said boiler. It was also found that the pipe, communicating steam to the gauge, which should show the amount of steam in the boiler, by means of which the "pop-valve" could only be set, was nearly stopped by incrustated matter so that it could not indicate the true state of the pressure of steam in the boiler at any given moment.

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A. J. Parker, A. J. Parker, Jr., and E. Countryman, for plaintiff.

Hamilton and Frederick Harris, for defendant.

MOTION by defendant for a nonsuit.

WESTBROOK, *J.* — I have, during the interval which the adjournment of the court last evening has given me, considered the points which this motion for a nonsuit presents, and having reached a conclusion, I will state it and very briefly give the reasons which lead me to it. One, and I think the main, question which the motion involves is: Are employers who construct or repair machines liable to their employes who are engaged in the construction or repair of a machine upon which they are ordered to make certain repairs, provided some other workman in the same shop has so carelessly done his prior part of the work of repair as to leave the machine unfit to have any additional work done upon it, and in consequence thereof the employe who undertakes to do the last work is injured? The general rule undoubtedly is that an employer who furnishes the machine for his servant to work with is bound to provide one safe for that purpose, but when a machine which is safe has been furnished the men who operate it ordinarily take upon themselves the risk of their fellow-workman's carelessness. When, however, an accident occurs, not in the operation but in the construction or repair of a machine for operation, in the doing of which the party, a servant, is injured, such accident being caused by the negligence of another servant who had done a previous and different part of such work of construction or repair, is the master then liable in damages for the injury?

If it be admitted that men who work for a common object and a common employer take upon themselves the risk of the carelessness of their fellows, as illustrated by the case of the engineer and fireman of a locomotive, in running which

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each performs a different duty, then why is not the same rule applicable to men who work for one object for a common employer, the employment being the repair or construction of a locomotive, in doing which different men must perform distinct and separate work ?

None of the cases cited touch this exact question, and that must, therefore, be solved amid the hurry of the circuit (which allows no time to search for precedents) by the application of general rules.

In *Wood on the Law of Master and Servant* (sec. 435) it is said : "It is subjection to the same general control, coupled with an engagement in the same common pursuit, that affords the test." In the construction or repair of a locomotive all workmen engaged for that purpose are, as it seems to me, within this rule though the labor of each may be different. In the progress of construction or repair different workmen have different work to do upon the same machine, but as they are all thus occupied for one object and for a common employer each engaged thereupon must, therefore, assume the risk of the carelessness of the other. In the case before us the locomotive Sacramento was sent to the repair shop of the defendant to be put in order. No one man was to do the whole work, nor did anyone employed upon it suppose it to be in a safe condition, for if it had been all knew it would not be in the shop for repair. The boilermaker was to repair and examine the boiler, machinists were to make good and adjust the machinery, and the work of setting the safety-valve at a point where it would hold 133 pounds of steam to the square inch, and no more, was a part of the necessary work of repair. All the men thus employed were workmen in the same shop, and their business was to fit locomotives for use. The deceased, a skilled machinist, by the order of the superintendent or foreman of the repair shop, was assisting one Smith, also a machinist, to set the safety-valve when the explosion took place.

Construing the evidence most favorably for the plaintiff

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(it must be so construed for the purposes of this motion) it will be assumed that the boilermaker had not thoroughly done his work, that the boiler was insecure by reason of broken stay-bolts and the channeling of the plates of the boiler near the mud-ring. Assuming all this to be true, whose negligence was it?

It was the duty of the boilermaker, and that duty is proven by the foreman of the shop, to put the boiler in repair, and he had pronounced it, when it left his hands, safe for use. He had not, however, performed his duty, as must be assumed for the purposes of this motion, and for his negligence the defendant, in my judgment, is not responsible. There is no pretense that he was an incompetent man, and his orders were to repair the boiler and make it safe. He was a workman in the same shop with the deceased, employed with him for the same general purpose, to wit, the placing in order of a locomotive for use. The different kinds of labor done to produce the result did not make them workmen for a different department of service any more than the different occupation of engineer and fireman upon a locomotive to run her make them servants in different departments and the company liable for the negligent act of either which occasions injury to the other.

It was argued by the learned counsel for the plaintiff that when a workman receives orders from his superior to do work *with* a machine, that the employer guarantees the fitness of the machine to do the work ordered, and that there is no good reason why the same rule should not apply to the case of a workman ordered to make repairs *upon* it. The argument is fallacious, for in its premise it overstates the rule as to the liability of the master. It is true that the master is bound to furnish a machine fit to do work with, but it is not true that when an order is given to operate the machine that he is responsible for an act of carelessness of a co-servant, which has rendered the machine unfit for the service intended. Take the case, for instance, of a locomotive which a fireman and engineer are given to oper-

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ate. The conductor of a train, which is to be hauled by the engine, gives orders for the start. When, however, such order is given, through some act of carelessness of one of the persons (the engineer or fireman) in charge of the locomotive, it has been either rendered or left in a condition unsafe to do the work ordered, and the other not in fault in obeying the order to start is injured, is the master whose servants they all were, to respond in damages for such injury? Manifestly not, for the employe who gave the order had no right to assume that either the engineer or fireman had been negligent, and if he had been, it was the precise risk that the party injured assumed, for all were within the same circle or sphere, of employment. What is true in the supposed case is equally true in the one on trial. The boilermaker, the foreman of the shop, the deceased and Smith, who together were adjusting and setting the safety-valve, were all engaged in the same character of work, to wit: preparing the engine for service. The foreman of the shop when he directed the setting of the valve, had a right to assume the fidelity and thoroughness of the boilermaker's work, just as much right so to assume as the conductor in starting the train had a right to suppose that neither fireman or engineer had made or left the engine unsafe to obey his order. And in neither is the master at fault, for it is simply impossible for him to test every man's work, and to know that every servant has done his duty. The law goes far enough, when it holds the master responsible for negligence committed in a department of service different or separate from that in which the injury occurs, and the servant must himself assume the risk of the negligence of his fellows in the same department. To hold otherwise would be the obliteration of all risk by the servant for the carelessness of his fellows, and the assumption by the master of liabilities hitherto, at least, unknown to the law, and which would impose upon him duties impossible to perform.

The case of *Besel* agt. *The New York Central and Hudson River Railroad Company* (70 N. Y., 171) is nearly, though

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not precisely, analogous. The plaintiff's intestate was at work in the yard of the defendant under a car standing upon the repair track repairing it. While thus engaged other cars were being drawn away by the engine when a coupling-pin broke and the disconnected cars ran back upon the down grade, striking the car upon which the party was at work and killing him. It was held the yard-master and head brakeman were, with the deceased, co-employees of the defendant, and for their negligence the defendant was not responsible.

This decision was placed upon the ground, and I quote from the opinion of judge MILLER: "that the men were engaged in the same common work for the same common purpose, and the acts of no one of them could render the defendant liable for the injury to another." If the principle just enunciated was applicable to that cause, it must be to the one on trial. The man killed in the case referred to was a mechanic; the men who were careless were those who moved the cars to be repaired. Their work was different, but it was all aimed at one result—the repair of machinery. In the present case the work of the boilermaker and machinist was different, but they also worked for one object, the repair of a locomotive, and being thus engaged, the rule of liability of the employers must be the same.

I have not overlooked the point that Smith, who was engaged with the deceased in setting the safety-valve, may also have been careless in not seeing that the pipe leading to the steam indicator was unobstructed, and that Smith's carelessness, if he was careless, was that of a co-employee. This view, however, involves a question of fact—whether the steam was put up higher than 133 pounds to the square inch? and, therefore, the decision nonsuited the plaintiff is not placed upon that ground, but upon that which we have considered.

At first I thought that I would, for the purposes of this trial, hold that the defendant was liable if the locomotive boiler was not in a condition to bear the strain of the steam

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pressure — 133 pounds to the square inch — which the deceased and Smith were directed to put upon it in setting the safety-valve, and if the jury found against the defendant upon such an instruction, grant a new trial, if, upon further consideration, my present views of the law remained unchanged. Reflection, however, satisfied me that this course would be unjust to the plaintiff, because the court above while differing from me upon the ground upon which the new trial was granted, might still affirm the order for some other reason and the case might come back again for trial without the point which has been discussed, settled beyond review.

The plaintiff is entitled to a ruling which will enable her to present distinctly the question which is now decided, and if necessary present the same to the court of last resort unembarrassed by any other difficulty. The nonsuit is, therefore, granted for the sole and only reason that the defendant is not, as I think, responsible to the plaintiff for the acts of other servants in the same department with him, who either failed to put the boiler in a condition of repair sufficient to sustain the pressure of steam which the deceased, intestate, was ordered to apply, or omitted in the act of repair, including that of the setting of the valve, anything which should have been done to render the work upon which the deceased was engaged at the time of the accident as safe as the nature of the service would permit.

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SUPREME COURT.

HUGH BROTHERTON agt. JOHN DOWNEY.

Answer — denial of allegation in complaint, how may be made — Code of Civil Procedure, sections 524, 526.

Denial of allegations in the complaint may be made upon information and belief.

A party has no right to interpose an unqualified denial in a verification unless it be founded upon personal knowledge, and where he has not personal knowledge, but has knowledge or information sufficient to form a belief, he is not only permitted but bound, at his peril, to deny upon information and belief.

First Department, General Term, June 1880.

THIS is an appeal from that part of an order made at a special term of this court held by Mr. justice DANIELS, March 8, 1880, which strikes out paragraph 1 of the defendant's answer as "irrelevant and redundant." "Paragraph 1" of the defendant's answer reads as follows: "He denies, upon information and belief, each and every allegation contained in the complaint of the plaintiff Hugh Brotherton, excepting so far as any or either of the allegations therein contained may be hereinafter admitted, denied or otherwise answered." The order strikes out the whole of the above recited portion of the answer, and this appeal is taken from that part of the order. The complaint and answer are verified. The allegations in the complaint which charge the defendant with speaking false, scandalous and defamatory words are positively denied. An employment by Mr. Astor is admitted for purposes stated in the answer, and, also, the discharge of the plaintiff for disobedience of orders; so that the allegations of the complaint, denied upon information and belief, are those respecting plaintiff's business, his reputation as a workman, and the discharge of the plaintiff by reason of the alleged slanders, &c.

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B. F. Kissam, for appellant.

I. Section 500 of the Code of Civil Procedure (*sec. 149 of former Code*) remains the same as it was in 1852, and of itself permits a denial upon information and belief. In 1858, in the case of *Sackett agt. Havens*, it was decided at a special term of the supreme court that a denial might be made upon information and belief (*See 7 Abb. P. R., p. 371, note*). In *Davis agt. Potter* (4 *How.*, 155, also 2 *Code R.*, 99) an answer beginning: "The defendant verily believes and, therefore, answers and says that the plaintiff is not," &c., held sufficient. There is nothing in the section which prohibits a denial upon information and belief, whilst the last sentence of the first subdivision of the section compels a denial upon information in cases where the party pleading has knowledge or information sufficient to form a belief. If he is limited in his denial to personal knowledge, and yet has knowledge or information sufficient to form a belief but is not permitted to deny in such form, he must either swear to what he does not personally know or be guilty of false swearing, if he should deny having any knowledge or information sufficient to form a belief or be cut off from a defense.

II. Under the former Code it was not necessary for the party pleading to be so particular for the reason that it was held unnecessary for a party to specify in his pleadings the allegations or denials which were within his personal knowledge and those which were on information and belief. The section of the former Code (*sec. 157*) read as follows: "The verification must be to the effect that the same is true to the knowledge of the person making it, except as to those matters stated on information and belief," &c. The section (*sec. 526*) of the Code of Civil Procedure reads: "The affidavit of verification must be to the effect that the pleading is true to the knowledge of the deponent, except as to the matters therein stated to be alleged on information and belief," &c.; clearly showing that the party must, in his pleading, state when his allegations are made on information and belief.

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III. Section 524 of the Code of Civil Procedure places the question beyond a doubt. It reads: "The allegations or denials in a verified pleading must, in form, be stated to be made by the party pleading. Unless they are therein stated to be made upon the information and belief of the party they must be regarded for all purposes, including a criminal prosecution, as having been made upon the knowledge of the person verifying the pleading. An allegation that the party has not sufficient knowledge or information to form a belief with respect to a matter must, for the same purposes, be regarded as an allegation that the person verifying the pleading has not such knowledge or information." The result is that: 1. A party who answers of his own personal knowledge must simply deny. 2. A party who answers from hearsay and from facts and circumstances outside of personal knowledge must deny, upon information and belief, or be held to all the liabilities and responsibilities of one answering of his own knowledge. 3. A party who alleges he has not sufficient knowledge or information to form a belief, when he does possess it, is placed in the same category.

IV. The order of the special term so far as appealed from should be reversed, with costs of appeal.

Henry H. Morange, for respondent.

I. This action is brought to recover damages for slanderous words uttered by defendant respecting plaintiff and his business, &c. Section 500 of the Code says: "The answer of the defendant must contain a general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. This is mandatory." Section 524 in no manner modifies section 500 but refers merely to statements or allegations made by a party in a pleading and not to denials (*Lloyd agt. Burns*, 38 *N. Y. Sup. Ct.*, 423).

II. This being an action of slander the defendant must know, of his own knowledge, whether he uttered the lan-

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guage imputed to him. The clause in question denies "upon information and belief." Under any circumstances this is not a good denial in an action of this character. It has been frequently held that "as to matters, the truth or falsity of which is within defendant's own knowledge, a denial on information and belief is not sufficient" (*Edwards agt. Lent*, 8 *How.*, 28; *Crucible Co. agt. Steel Works*, 57 *Barb.*, 447). The order appealed from should be affirmed, with costs.

BARRETT, J. — The form of denial was proper. If defendant had no personal knowledge upon the subject he could not unqualifiedly deny. If he had knowledge or information sufficient to form a belief he could not deny such knowledge or information. What then was he to do? Clearly to deny upon information and the belief formed therefrom. Under the Code of Procedure the denial, whether founded upon personal knowledge or upon information and belief, was in form the same, that is, absolute. By the verification the defendant was permitted, in a great measure, to impress upon the pleading the operation of his mind. When the denial was of matter not necessarily within his personal knowledge he could not verify it under the exception of matter stated upon information and belief. Whether such denial was really made upon knowledge or upon information and belief remained undisclosed upon the record. It was known only to the defendant and was a matter between himself and his conscience. This was deemed unsatisfactory and, consequently, the Code of Civil Procedure provided for a distinct disclosure, upon the face of the pleading, of the character of the denial. Section 526 introduces what is, in substance, the old chancery verification (*See Rule 18 of the court of chancery*). The exception is no longer matter stated upon information and belief but matter stated to be alleged on information and belief. Of course that permits a party to so allege. Nor is this limited to affirmative allegations, for in section 524 we find that denials as well as allegations are referred to. It is,

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therefore, provided that unless the allegations or denials in a verified pleading are "therein stated to be made upon information and belief of the party they must be regarded for all purposes, including a criminal prosecution, as having been made upon the knowledge of the person verifying the pleading." It is quite clear from these provisions that a party has no right to interpose an unqualified denial in a verification unless it be founded upon personal knowledge; and that where he has no positive knowledge but has knowledge or information sufficient to form a belief he is not only permitted but bound, at his peril, to deny upon information and belief.

DAVIS, P. J., and INGALLS, J., concurred.

N. Y. COMMON PLEAS.

ROBERT McMURRAY agt. ROBERT HUTCHESON and others.

Foreclosure of mechanic's lien.

A subcontractor filing a lien, after an assignment, for the benefit of creditors by his contractor is entitled to judgment against the owner, contractor, and his assignee for the foreclosure of the lien, and is not compelled to share in the general fund in the hands of the assignee as an ordinary creditor. And where the assignee of the contractor has paid the amount of the lien to the county clerk, and the lien has thus been discharged, the amount so deposited is in lieu of the property, and the lienor upon bringing his proper action is entitled to judgment for the payment to him of the money so deposited.

The mechanic's lien laws of 1875, as amended in 1879, are not different in these respects from the former mechanic's lien laws of 1830 and 1851 under which the courts have made decisions on this subject.

The costs in such an action must be paid out of the contractor's estate, before any claims owing by Jennings have been satisfied.

Special Term, July, 1880.

THE defendant, Robert Hutcheson, being the owner of several houses in Third avenue, in the city of New York,

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made a contract with the defendant, John Jennings, to perform the carpenter work, and Jennings made a subcontract with the plaintiff, Robert McMurray, to perform the wire-work under his contract, which the plaintiff completed on the 26th December, 1879, amounting to \$122.50.

Jennings had not completed his contract when he failed, and made a general assignment for the benefit of his creditors to the defendant, William E. Price, on the 13th day of January, 1880. On the 14th day of January, 1880, the plaintiff filed his lien with the clerk of the city and county of New York upon the property of the defendant Hutcheson for the amount of his work. On the seventh day of February, 1880, the defendant, Price, as assignee, deposited with the county clerk the amount of the lien and interest, \$123.16, and the lien was discharged.

The assignee completed the contract of Jennings and received \$1,500, the amount of the contract-price.

The plaintiff made a demand upon the assignee and the county clerk for the payment to him of the amount of the lien deposited, and they refused to pay him, whereupon the plaintiff brought this action; none of the defendants defended except the assignee.

R. S. Johnson, for the assignee, contended that as the lien was filed after the assignment by the contractor, the plaintiff could only be paid out of the general fund the same as other creditors, and that he had never acquired a lien; that the money deposited with the county clerk belonged to the assignee, to go into the general fund of which plaintiff would receive his *pro rata* share the same as other creditors of the contractor; that under the mechanic's lien act of 1875, as amended in 1879, there was no authority, as in former acts, for plaintiff acquiring a lien under the circumstances. He cited *Brown agt. Zeize (MS.)*, common pleas, general term, March, 1880.

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George F. Langbein, for plaintiff, contended that if the owner, Hutcheson, had failed and made an assignment for the benefit of his creditors, the position and argument of the assignee would be correct, but the owner did not fail and make an assignment, and as the lien was on his property the money deposited was in lieu of the lien and, therefore, still existed in law on the property of the owner although, in fact, it was discharged therefrom.

The property did not belong to Jennings, the contractor, it belonged to Hutcheson, therefore the money does not belong to Jennings, or his assignee, as the money simply took the place of the property. The assignee, Price, was not bound to deposit the money, plaintiff could have kept his lien, and the owner could have defended the foreclosure of the lien, if he had any defense.

The lien not being on the property of Jennings, his assignee cannot deprive the plaintiff of obtaining his money out of the lien on the property of Hutcheson by claiming he deposited the money and the money belongs to him.

The property upon which the law gave the plaintiff a lien is to pay the plaintiff for his work and material put into it.

The assignment by the contractor for the benefit of his creditors does not operate to change the relations between the subcontractor and the owner. The subcontractor could perfect a lien *after* the assignment (*Maderville agt. Reed*, 13 *Abb.*, 173; *Henderson agt. Sturgis*, 1 *Daly*, 336).

The assignee stands in the place of the contractor and acts for his benefit, and if he performs the contract, or becomes entitled to any payment under it, the subcontractor can acquire a lien to the same extent as if the assignment had not been made (*Oates agt. Haley*, 1 *Daley*, 338).

There is no difference between the lien laws of 1851 and 1863, and those of 1875 and 1879, affecting the present question. The cases cited were decided under the former lien laws of 1830 and 1851; these laws made no express enactment which caused the courts to make these decisions. The Laws

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of 1863, section 1, had an express enactment, and the Laws of 1875, chapter 507, sections 4, 14 and 17, give a subcontractor a lien ahead of the contractor. Section 4 of the Law of 1875, as amended in 1879, is stronger in favor of the subcontractor upon this question than any of the prior acts.

The completion of plaintiff's contract with Jennings enabled the assignee to complete Jennings' contract with Hutcheson and obtain the payment. The assignee was, therefore, paid for plaintiff's work, and in all fairness and equity plaintiff should be paid his money.

VAN HOESSEN, *J.* — The contractor Jennings made, on the 13th day of January, 1880, an assignment for the benefit of his creditors. On the following day, the fourteenth, the plaintiff, who was subcontractor under Jennings, having completed his contract filed his lien under the mechanic's lien act. The lien was afterwards discharged by the payment of the amount thereof to the county clerk. This payment was made by Mr. Price, Jennings' assignee. Price made the payment because he had made an arrangement with Hutcheson, the owner of the building, to go on and finish Jennings' contract. He fully performed Jennings' contract and obtained the money, which was payable thereunder to Jennings. McMurray has brought his action to foreclose his lien and the question is, who is entitled to the money which Price deposited with the county clerk, McMurray, the lienor, or Price, the assignee? The equities are all in favor of McMurray, and the decisions of this court seem to me to entitle him to recover. Price, not for himself but for the benefit of the assigned estate, did the work which his assignor had left undone and obtained from Hutcheson payment, not only for what he did but also payment for the work which had been done by McMurray. Is it fair that he should retain what was honestly coming to McMurray?

Again, he assumed the contract of Jennings with Hutcheson, and by doing so placed himself in Jennings' shoes, so

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that whatever Jennings would be bound to do he is equally bound to do. The case is the same as if Jennings himself had performed the contract, and the rights of McMurray are the same as they would then be.

The cases in this court which I have referred to are *Henderson* agt. *Sturgis* (1 *Daly*, 336), and *Oates* agt. *Haley* (1 *Daly*, 338).

The plaintiff is entitled to judgment, with costs payable out of the Jennings' estate, but not by the assignee, personally. My intention is that the costs shall be paid before any claims owing by Jennings have been satisfied, but I cannot direct the assignee to pay them forthwith (*See decision on this subject made by me in June, 1880*).

SUPREME COURT.

JOSEPH TROW, trustee under the will of CHARLES R. LOHMAN, deceased, agt. CARRIE S. SHANNON, individually, and as administratrix with the will annexed, and others.

Executors—their renunciation after letters issued—its effect—executors as trustees.

Where one of two executors, after letters testamentary were issued to both, petitioned the surrogate that the letters testamentary issued to him might be revoked, for reasons assigned by him, and that he be discharged from his office as executor, and such petition was granted by a decretal order of the surrogate, but in such form as not to affect the letters testamentary granted to the other executor, and the executor so discharged, afterwards, and by an instrument in writing, executed and acknowledged by him, in pursuance of the order of the surrogate, formally renounced and resigned his office as executor, and when afterwards, upon the death of the surviving executor, letters "*de bonis non*," with the will of the testator annexed, were issued to a third person by the surrogate :

Held, that upon such facts the executor so released and discharged, there being no unexecuted trust under the will remaining in him, had no standing to maintain an action for the construction of the will, and this, although he was a legatee under the will, especially when it appeared that he had assigned all his interest in the legacy.

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Where an executor, upon his own petition, has been released from his office as executor, and has formally renounced, he cannot, after letters "*de bonis non*," with the will annexed, have been, by the surrogate, issued to another, retract his renunciation and seek to be restored (*Robertson* agt. *McGeoch*, 11 *Paige*, 640).

Executors as trustees, the question considered.

Special Term, December, 1878.

ACTION for the construction of the will of Charles R. Lohman, deceased.

Justus Palmer, for plaintiff.

Orlando L. Stewart, for defendants

VAN VORST, *J.*— This action is brought for the construction of the last will and testament of Charles R. Lohman, deceased.

The testator by his will appointed the plaintiff executor and his wife, Ann Lohman, executrix thereof. The testator died in January, 1877.

The will, which disposed of both real and personal estate, was admitted to probate and letters testamentary were issued to the executor and executrix.

Afterwards, and on the 24th day of April, 1877, upon the petition of the plaintiff to the surrogate of the county of New York, in which the petitioner, for the reasons assigned in said petition, asked that the letters testamentary issued to him might be revoked and he be discharged from his office as executor, the surrogate made a decretal order by which he revoked the letters testamentary, in so far as they affected the plaintiff and his office as executor under the will, and he was released and discharged from them.

The decree of the surrogate was made in such form as that the letters testamentary granted to the executrix and her rights thereunder were not affected.

Afterwards the plaintiff, by an instrument in writing exe-

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cuted by him and acknowledged in pursuance of the order of the surrogate, formally renounced and resigned his office as executor under the will and all right thereto.

Ann Lohman, the executrix, died on the 31st day of March, 1878, and letters *de bonis non*, with the will of Charles R. Lohman, deceased, annexed, were afterwards issued by the surrogate of New York to the defendant, Carrie S. Shannon.

It appears to me that upon this statement it is quite clear that the plaintiff stands in no such relation to the will, or the estate devised and bequeathed thereunder, as to entitle him to maintain this action. He has no interest, direct or indirect, in the subject-matter.

He is, it is true, a legatee under the will, but that would give him no right to institute this suit in equity. As a legatee his claim for his legacy is legal and not equitable.

But even as to the legacy he has no claim, for the reason that he parted, by assignment to Mrs. Lohman in her lifetime, with his interest in the same.

The plaintiff claims, however, that there are trusts created by the will, the execution of which are cast upon him thereby, and that as such trustee he may bring this action.

I cannot find from an examination of the will that there is any remaining unexecuted trust in him, or that he is under any duty to any person interested in the estate under the will.

By the will the whole estate, real and personal, was devised and bequeathed by the testator to his wife, Ann Lohman. By subsequent provisions of the will legacies were given to some and payments directed to be made to others out of the testator's estate.

Mrs. Lohman, in whom the whole legal estate was vested by the will, undoubtedly took the same subject to the payment of these legacies and the sums payable thereout.

The plaintiff was not by the will constituted a trustee. He was not charged, by the terms of the will, in any way or manner with the duty of trustee, except as such trust was involved in his office of executor.

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Executors in one sense are trustees. They succeed to the personal estate for the purpose of administration, and in relation to that they are, doubtless, accountable as trustees.

They have no duty with respect to the real estate, and the property in this case was chiefly real.

But the relation of the plaintiff as executor was ended before the death of Mrs. Lohman, and with the termination of his office the duties growing out of the office from that time ended.

It is not before me to inquire whether the order made by the surrogate revoking the letters granted to him was proper or authorized. It was made on plaintiff's own application, and as to any affirmative action taken by the plaintiff the order of the surrogate, so long as it remains in force, is a complete answer.

The plaintiff's counsel suggests, however, that the plaintiff may retract his renunciation and ask to be restored. It is sufficient to say that he has not, up to this time, done so, and that he has not been reinstated.

But he cannot now retract. His place has been filled. It is too late to retract after letters of administration, with the will annexed, has been issued to another (*Robertson* agt. *McGeoch*, 11 *Paige*, 640).

It is not necessary to determine whether or not the administrator, with the will annexed, can execute any trust imposed upon Mrs. Lohman by the will, if any such trust be created.

If there be a trust unexecuted and the office of trustee be really vacant, the plaintiff because he was named as executor, the office of which he has resigned, does not succeed to it but it will devolve upon the court to appoint a trustee.

There is ample authority for the conclusion that the plaintiff cannot maintain this action (*Bowers* agt. *Smith*, 10 *Paige*, 193; *Bailey* agt. *Briggs*, 56 *N. Y.*, 407; *Stinde* agt. *Ridgway*, 55 *How. P. R.*, 301; *Chipman* agt. *Montgomery*, 63 *N. Y.*, 221).

The complaint must be dismissed, with costs.

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COURT OF APPEALS.

WILLIAM H. ROBINSON agt. THE NATIONAL BANK OF NEW
BERNE.

Jurisdiction of state courts—Attachments against national banks or their property.

A state court has jurisdiction of an action on contract brought by a resident of the state against a national bank incorporated under title 62 of the Revised Statutes of the United States located in another state.

The last clause of section 5242, United States Revised Statutes, forbidding an attachment, injunction or execution to be issued against a national bank before final judgment in any proceeding in a state court applies only to such banks as have committed or are contemplating an act of insolvency.

An attachment can, therefore, issue against a national bank, except under the above circumstances, from a state court as provided by the Code of Civil Procedure (*Affirming, S. C., 58 How., 806*).

May, 1880.

A. R. Dyett, for appellant.

T. C. Cronin, for respondent.

DANFORTH, J. — This case comes here upon appeal by defendant from an order made by a general term of the supreme court of the fourth department upon the following facts: The plaintiff resides in this state and is a creditor of the defendant. The defendant is a banking association organized under the laws of the United States (*title LXII, U. S. R. S.*) and is located at New Berne, North Carolina. Upon affidavits showing these and other facts sufficient to bring the case within the provisions of the Code of Civil Procedure, in force in this state, an attachment was granted by one of the justices of the supreme court and levied upon

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property of the defendant in the city of New York. The defendant moved at a special term to vacate the attachment, but the motion was denied and the order there made was affirmed at general term. It is from the order of affirmance that this appeal is taken. The defendant seeks to sustain the appeal upon two grounds: First. That the supreme court had no jurisdiction over the action. Second. If otherwise it had no power to grant the attachment. But, notwithstanding the ingenious argument of the learned counsel for the appellant, I think neither position can be sustained. First, as to jurisdiction; it is not necessary to consider whether congress might have conferred upon the Federal courts exclusive jurisdiction over actions against national banks and prohibited the state courts from entertaining them; but this could be done, if at all, only by express language or provisions consistent only with that construction (*Houston agt. Moore*, 5 *Wheat.*, 1, and other cases cited, *infra*). In its absence a state court would have the same power and jurisdiction in suits, to which a national bank was a party, as if it was an individual (*Bower agt. First National Bank of Medina*, 34 *How. Pr.*, 409; *Cooke agt. State National Bank of Boston*, 52 *N. Y.*, 96). I do not find such language or provisions in the act under which the defendant is organized. Nor is its existence claimed by the learned counsel for the appellant who has submitted this case in an exhaustive oral and printed argument. In the latter he says: "And congress has not only nowhere deprived the state courts of jurisdiction of *actions against national banks* but has expressly conferred it, at the same time conferring a similar jurisdiction upon the Federal courts, but in both cases requiring actions and proceedings against them to be brought *in the state where they are located* and protecting them from attachment and similar process *before judgment*," and asserts "that the plaintiff has all the remedy to which he has any just claim in an action against the defendant in the state or Federal courts of North Carolina."

The contention then is, that outside of the state where the

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bank is located neither Federal nor state courts have jurisdiction, and that redress for any cause of action must be there sought; and as it has been held that the statute referred to extends to actions *by* as well as against these corporations (*Kennedy* agt. *Gibson*, 8 *Wall.*, 498) it would follow that the bank must confine its operations to the limit of its own state or be deprived of legal or judicial aid to enforce its rights. This construction seems to be unwarranted by the very conditions of its being. The defendant was endowed with certain powers and privileges, in the exercise of which it might be brought into relation with citizens of different states, and we might, therefore, expect that its liabilities arising therefrom could be enforced in the same manner and to the same extent as if it was a natural person and not a creation of the law. It was to loan money and discount commercial paper, and although located in North Carolina its transactions might extend into other states, for its interest would follow the person of its debtors, and it would be concerned in the disposition of his property wherever situated. ("It is, therefore, provided that it may purchase and hold such real estate as may be mortgaged to it in good faith by way of security for debts previously contracted, or such as shall be conveyed to it in satisfaction of similar debts contracted in the course of its dealings, or such as it shall purchase at sales under judgment, decrees or mortgages held by it, or shall purchase to secure debts due it" [*Sec. 5137, sub. 23, U. S. Rev. Stat.*]). It is obvious, then, that it might have occasion to sue its debtor in any state and resort to the courts therein for protection in the enjoyment of the property which it is thus permitted to acquire; as the owner of property it might also incur liability to citizens of the state or municipality where it was situated; and we also find that it may incur a statutory liability to its borrower, and that if it violates the law relating to interest, he may recover back twice the amount of excessive interest paid by him. Against it, therefore, the individual might find it necessary to put in motion the machinery of the

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courts, and from these powers and liabilities a right on either side to do so might be implied. But this is not left to implication. The statute declares that the defendant may "sue and be sued" in any court of law and equity as fully as a natural person (*Sec. 5136, sub. 4*). Now such a person, a citizen of North Carolina, might sue in any state where he could find his debtor, or the property of his debtor, and he was liable to be sued in any state where he might happen to be or where his property could be found, and the proceeding would, in the courts of the state, be according to the jurisdiction given to them by the state; and suits might also be brought in the courts of the United States, provided the contending parties were not citizens of the same state. If they were it could not have been until the passage of the national banking act of 1864 (*sec. 57, amended March 3, 1873, vol. 17, U. S. Stat. at Large, chap. 269, sec. 2; sec. 5198, U. S. Rev. Statutes*), where it was, among other things, enacted "that suits, actions and proceedings against any association under this act may be had in any circuit, district or territorial court of the United States held within the district in which such association may be established." The evident object of this provision was to give the Federal courts jurisdiction without regard to the citizenship of the plaintiff (11 *Blatchford*, 102). But the same section further provides "that such suit, &c., may also be had in any state, county or municipal court in the county or city in which such association is located, having jurisdiction in similar cases." And, as above stated, this section has been construed so as to permit suits by as well as against the corporation (*Kennedy agt. Gibson*, 8 *Wall.*, 498). It is this clause upon which the appellant relies in support of the proposition we are now considering. It has, however, been already declared in this court that these words cannot be construed as taking away the jurisdiction of the courts of this state over associations similar to this defendant (*Cooke agt. State Nat. Bank of Boston*, 52 *N. Y.*, 96), and the argument on which that case rests need not

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be repeated. It finds confirmation, however, in the consequences likely to result from a different doctrine. Nor can we suppose that the general power and liability to sue and be sued, given by statute as above stated, was intended to be repealed or modified in this indirect manner. The general liability subjects them to an action in any court in which an individual in like circumstances might be sued, and the subsequent enumeration of particular courts without words of exclusion, cannot have the effect to deprive other courts of jurisdiction (*Owens agt. Woosman*, 3 Q. B. [L. R.], 469). If it was otherwise then a citizen of this state having claim upon land in which a banking association located in another state had an adverse interest would be compelled to go there to assume his rights against it. Yet the contrary has been held by the supreme court of the United States in a recent case decided October term, 1879 (*Casey, Recr.*, agt. *Adams, &c.*, 21 *Albany Law Journal*, 376). Referring to section 5198, above cited, the court holds that it applies to transitory actions only and not to such as are by law local in their character, WATTE, Ch. J., saying: "Section 5136 subjects the banker to suits at law or in equity as fully as natural persons, and there is nowhere in the banking act any evidence of an intention on the part of congress to exempt bankers from the ordinary rules of law affecting the locality of actions founded on local things. The distinction between local and transitory actions is as old as actions themselves, and no one has ever supposed that laws which prescribed generally where one should be sued, included such suits as were local in their character, either by statute or the common law, unless it was expressly so declared. Local actions are in the nature of suits *in rem*, and are to be prosecuted where the thing on which they are prosecuted is situated. To give the act of congress a different construction would be, in effect, to declare that a national bank could not be sued at all in a local action where the thing about which the suit was brought was not in the judicial district of the United States within which the bank

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was located; such result could never have been contemplated by congress." We may construe the words of section 5198, which confer power to bring suits in certain specified courts as permissive merely and not mandatory, and, therefore, not limiting the general rule which permits civil cases arising under the laws of the United States to be prosecuted and determined in the state courts unless exclusive jurisdiction of them has been vested in the Federal courts, or unless congress has prohibited the state courts from entertaining jurisdiction of such cases (*Clafin* agt. *Houseman, Assignee*, 93 *U. S. Rep.*, 130; 1 *Kent's Com.*, pp. 395, 396; *Bank of U. S.* agt. *Devereux*, 5 *Cranch*, 85; *Osborne* agt. *U. S. Bank*, 9 *Wheat.*, 738; *Teale* agt. *Fulton*, 1 *Com.*, 537). In *Houston* agt. *Moore* (5 *Wheat.*, 1) Mr. justice WASHINGTON, in delivering judgment, says (*page* 27): "I hold it to be perfectly clear that congress cannot confer jurisdiction upon any courts but such as exist under the Constitution and laws of the United States, although the state courts may exercise jurisdiction in cases authorized by the laws of the state and not prohibited by the exclusive jurisdiction of the Federal courts;" and that case also holds that the mere assignment of jurisdiction to a particular court does not necessarily render it exclusive. It may very well be that when the right in controversy is created by an act of congress, and the remedy is prescribed to be by suit in the Federal courts, the state courts have no jurisdiction. But that is not this case, nor are these words of exclusion. If we look into other laws enacted by congress, and in which provision is made for proceedings before one court rather than another, we shall find a marked difference in language implying clearly a different interest. In title 13, chapter 12, United States Revised Statutes, concerning the judiciary, eight cases of suits and proceedings and litigants of particular character are specified, and as to them it is said: "The jurisdiction vested in the courts of the United States * * * shall be exclusive of the courts of the several states." We cannot doubt that language equally explicit would

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have been used had a similar purpose been entertained in regard to matters of controversy under the banking law. It was not, and for this and other reasons above stated I am of the opinion that the supreme court had jurisdiction of the matter involved in this action. Second. Is the attachment prohibited? To determine this we must look at the whole section relating to it. It is section 5242 of the United States Revised Statutes (*edition of 1878*), and is in these words: "Section 5242. All transfers of the notes, bonds, bills of exchange or evidence of debt owing to any banking association or of deposits to its credit; all assignments of mortgages, sureties on real estate or of judgment or decrees in its favor; all deposits of money, bullion or other valuable thing for its use, or for the use of any of its shareholders or creditors, and all payments of money to either made after the commission of an act of insolvency, or in contemplation thereof made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with the view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution shall be issued against such association or its property before final judgment in any suit, action or proceeding in any state, county or municipal court." It is found in title 62, chapter 4, entitled "Dissolution and Receivership;" and although in ordinary cases it is said that the title of an act of congress is entitled to little, if any, weight (*Hadden agt. The Collector*, 5 *Wallace*, 107), yet when it occurs in the revision of the statutes it cannot be entirely disregarded. It would seem, in such a case, to indicate with great certainty what was in the mind of the legislature. The subject-matter of the section is the transfer of property by a banking association made "after the commission of an act of insolvency, or in contemplation thereof," when made under the circumstances therein stated, such transfer, it says, "shall be utterly null and void, and no attachment * * * shall be issued against such association or its property before final judgment in any suit,

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action or proceeding in any state, county or municipal court." We concur with the general term in the opinion that these words of prohibition must be deemed to have the same relation as the other things prohibited and apply only to insolvent corporations, or one about to become so; and that the object of the entire section is to prevent one creditor of a corporation, whose assets are insufficient to meet its liability, from obtaining a preference, whether it is sought through a voluntary assignment or transfer, or payment, or the form of a legal proceeding. It is plain that this is not the case before us; nor is the cause of action created by the act; nor does it arise in consequence of the violation of any of its provisions. It is for breach of contract, a remedy for which by action exists at common law, and for the enforcement of which against the property of a non-resident the statute has given the suit in question. It is a proceeding *in rem*, merely, not *in personam*, for that purpose the court neither has nor does it assume to have jurisdiction (*People agt. Baker*, 76 N. Y., 87). It must therefore, like other proceedings *in rem*, be prosecuted where the thing on which it is founded is situated (*Casey, Recr.*, agt. *Adams, supra*). The attachment is not to bring the defendant into court, its object is to give the plaintiff execution against the thing attached (*Kilbourn agt. Woodworth*, 5 Johns., 37). It does not go beyond it. It is not to compel the payment of debts but to make the property of absentees liable for their debts. Execution can go no further, neither against the property nor the person. It is confined to the property taken, and if it cannot be maintained the plaintiff is remediless unless he goes out of his own state and into the place where the debtor is located; for, as we have seen, according to the appellant's theory the state court has jurisdiction only in that place; and the same statute which confers it in like manner restricts the jurisdiction of the Federal courts.

The order appealed from should be affirmed, with costs.

All concur.

Trustees of the Northern Dispensary of New York agt. Merriam *et al.*

N. Y. COMMON PLEAS.

THE TRUSTEES OF THE NORTHERN DISPENSARY OF NEW YORK
agt. BENJAMIN W. MERRIAM *et al.*

Foreclosure of mortgage — judgment for deficiency — when and under what circumstances motion to set aside such judgment may be made — Code of Civil Procedure, section 1290.

In a foreclosure suit judgment for a deficiency was entered against parties upon a covenant in the deed given them upon the purchase of the property, whereby they assumed the payment of the mortgage. In the contract for the purchase they were simply to take the property subject to the mortgage. When they were made parties to the foreclosure suit they were unable to find the contract, and did not, until some time after judgment, discover that by the deed they were made to assume the mortgage, the instrument having been drawn without their inspection; they, therefore, allowed the foreclosure suit to go by default:

Held, that when the contract was discovered, it being within ten years after the judgment was entered, the defendants were entitled to ask that the judgment be opened and they be allowed to come in and defend.

As, by the terms of the contract, defendants were not to assume the mortgage the covenant which imposed the liability upon them was a mutual mistake between the parties thereto; and when the discovery of the contract showed defendants' non-liability for the deficiency they then had the right to resist responsibility which they had unknowingly assumed.

Special Term, July, 1880.

In this foreclosure suit judgment for deficiency was entered against Messrs. Koch & Jacob, attorneys, on November 9, 1878, upon a covenant in the deed given them upon the purchase of the property, whereby they assumed payment of the mortgage. In the contract for the purchase they were simply to take the property subject to the mortgage. When they were made parties to the foreclosure suit they were unable to find the contract, and did not until then discover that by the deed they were made to assume the mortgage, the instrument

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having been drawn without their inspection; they, therefore, allowed the foreclosure suit to go by default. Then when the contract was discovered the defendants, Koch & Jacob, asked that the judgment be opened and they be allowed to come in and defend.

LARREMORE, *J.* — This motion is made by the defendants, Koch & Jacob, to open a judgment entered by default against them November 9, 1878. It is based upon an error of fact not arising upon the trial and falls, therefore, within section 1290 of the Code of Civil Procedure. By the terms of the contract of sale they were not to assume the mortgage in question; and the covenant in the deed which imposed this liability upon them was a mutual mistake between the parties thereto, for the contract was *in writing* and there is nothing to show that there had been any change in its terms, in pursuance of which the deed should have been drawn. Not having the contract at hand when the foreclosure was had the defendants rightfully suffered a default, but when the discovery of the contract showed their non-liability for the deficiency they then had the right to resist the responsibility which they had unknowingly assumed. Suppose the recital of the amount of the mortgage in the deed had exceeded the amount of that named in the contract, would the former control and leave the defendants without any redress? There is no principle of equity that would sustain such a proposition. The defendants are entitled to their defense (*Kilmer agt. Smith*, 77 *N. Y.*, 226). Nor can I understand how a stipulation, to which these defendants were not parties, could change the order of payment of the liability of the defendants who were responsible for the deficiency.

According to the usual practice the liability was both joint and several, and I cannot understand from the papers submitted how the defendant Merritt has become a guarantor for these defendants. If he had paid the claim he might claim contribution, but he cannot insist, by virtue of any legal

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right, that a newly-discovered and meritorious defense may not be interposed to an alleged personal liability, where the laches are satisfactorily explained and the foreclosure proceedings proper are not impugned or delayed.

Motion granted on payment of costs; order to be settled, on notice, July twentieth at 11 A. M.

SUPREME COURT.

In the Matter of UNION AVENUE.

Commissioners to ascertain damages and assess the same — When the court will not interfere with their findings and conclusions.

The court should not, unless there be a palpable and manifest error committed, interfere with the findings and conclusions of a commission duly appointed by the court to ascertain the damages to the owners of property taken for the widening of a street or avenue, and to assess and apportion the same.

The report considered and the objections commented upon and reasons given for the confirmation of the report.

Special Term, May, 1880.

MOTION to confirm the report of commissioners on the widening of Union avenue.

George C. Preston and Seymour L. Stebbins, for motion.

A. T. Clearwater, E. S. Wood, C. R. N. Champlin and M. Schoonmaker, opposed.

WESTBROOK, J. — In conformity with section 94 of the charter of the city of Kingston a commission was duly appointed by this court, composed of Henry C. Connelly, David Gill and Daniel Allen, to ascertain the damages to the

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owners of property required for the widening of Union avenue, and to assess and apportion the same "on the real estate and against the persons benefited thereby." The report of the commission is now before the court for confirmation, and to it objections are made by some of the owners of property proposed to be taken on the ground that the sums allowed them are insufficient, and, also, by persons residing at the upper end of the avenue who claim that their property is erroneously assessed, and that property located upon other streets in the vicinity of the improvement should also be assessed. The general rule is well settled that the court should not, unless there be a palpable and manifest error committed, interfere with the findings and conclusions of a commission of this character. The men comprising the present one were selected with great care, and all parties had in them the fullest confidence. The duty they were called upon to discharge was entirely a matter of opinion and judgment, upon which judgments and opinions will be as many as the number of persons called upon to give them. By the section of the charter before referred to they were required to "view the premises and, in their discretion, receive any legal evidence." This language shows that they have full power to rely upon their own sight and judgment; and though they have the right to receive, as they did receive, evidence, still they have to act largely upon their own judgments. A careful consideration of the claims of the several persons who insist that the damages awarded to them are insufficient induces me not to disturb the report in any of those instances. Very likely, if the questions had been before me originally, I might have differed with the gentlemen who have made the estimates, but where so much depends on opinion it would be unsafe and improper to reverse their conclusions.

It is claimed, however, that the commissioners have committed errors of law, and these alleged errors will next be examined:

First. It is said that property upon other streets should

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have been assessed to make the improvement. This, I apprehend, is not an error of law but of fact, if there be any. The charter (*see section 94*) required the commissioners to "assess and apportion the said damages, if any, of such improvement on the real estate and against the persons benefited thereby, as nearly as may be, in proportion to the benefit resulting therefrom." It was for them to say who were and who were not benefited by the improvement; and as they have determined that the property on the street improved should defray the cost thereof, and as such cost has been graded on all property upon the street according to the distance from the spot of the improvement, I see no cause for interfering with the report in that particular.

Second. It is urged that evidence tending to show that part of the property proposed to be taken was within the bounds of the street was improperly rejected. This objection, also, has no force. It was not the province of the commission to determine the original bounds of the street, but only to ascertain the damages to be sustained by the alleged owner of specific property proposed to be taken. It was for the common council to determine what property might be properly claimed as belonging to the street; and when it had decided that certain premises needed for widening an avenue were not within its limits, and on the faith thereof applied for a commission to ascertain the damages which the alleged owners would sustain if taken, and such commission is organized only for that purpose, it certainly was powerless to adjudicate any other question, and especially one which would have directly conflicted with the inquiry to which it was expressly limited.

These general views, hastily penned, though adopted after careful thought, indicate my reasons for confirming the report, without any detailed discussion of each objection.

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SUPREME COURT.

THOMAS R. RUTHERFORD, assignee in bankruptcy of DAVID DENNIS, agt. JAMES HEWEY *et al.*

Bankruptcy — Jurisdiction of supreme court in action by an assignee in bankruptcy to recover estate of bankrupt — Assignee in bankruptcy may maintain action for partition — Leave of bankruptcy court not necessary — Two years' limitation of bankruptcy act no application.

This court has jurisdiction in all actions, legal or equitable, brought by an assignee in bankruptcy to recover the estate of the bankrupt, or to determine rights to property claimed by him as such assignee, or in any way affecting the same, and the jurisdiction conferred upon the Federal courts by section 1 of the bankrupt act was not exclusive. Nor does the subsequent amendment to that section passed June 22, 1874, affect the statute in this respect.

An assignee in bankruptcy may maintain an action for partition.

Leave of the bankruptcy court is not necessary before commencing the action.

The two years' limitation of the bankruptcy act has no application to such a case as this. The suit is not to recover property in dispute or to which there is any adverse claim, but it is brought for the purpose of getting it into a situation where it will bring the largest sum to the estate.

Nor does the discharge of the bankrupt restore to him this property.

Steuben Equity Term, March, 1880.

ON the 30th day of June, 1874, David Dennis, together with his three brothers, were the owners in fee of a farm situate in Steuben county, described in the complaint, each being the owner of an undivided fourth part thereof. On that day a proceeding in bankruptcy was commenced against David Dennis by his creditors, and on the 21st day of July, 1874, he was duly adjudged a bankrupt thereunder, and in the following September the plaintiff was duly chosen his assignee in bankruptcy and the usual assignment under the bankrupt act was made by the register acting in the matter to

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the plaintiff. The bankrupt's interest in the land was set out in his schedules, which was the only real or personal property owned by the bankrupt at the commencement of the bankruptcy proceedings. On the 9th day of March, 1875, the bankrupt was duly discharged from all his debts by a discharge in the usual form granted to him in the bankruptcy proceeding. No debts were ever proven against the estate of the bankrupt, and the proceeding was never finished or the assignee discharged. Up to the 3d day of April, 1879, the bankrupt with his brothers continued to occupy the land and to use it as their own, the assignee making no claim to it nor to the rents or profits. On that day the bankrupt with his brothers executed a deed of the premises to the defendant, Hewey. The plaintiff did not join in or consent to the conveyance, and in May, 1879, this action was commenced by the plaintiff as such assignee for partition and division of said lands, the plaintiff claiming to be the owner of the share formerly belonging to David Dennis, as such assignee, and as assets of the estate in bankruptcy. The action was the ordinary action for partition. The answer of the defendant set up the discharge of the bankrupt from all his debts, and that more than two years had elapsed since the cause of action accrued to the assignee, and that an assignee in bankruptcy could not maintain an action for partition.

J. F. Parkhurst, for plaintiff.

I. Leave of the bankruptcy court was not necessary before commencing this action. To this point I have only to remark that by section 5044 the title to all the real and personal property of the bankrupt is, by the assignment, vested in and conveyed to the assignee; and the same statute which provides that the assignee may sell and dispose of the property also has this provision: "The assignee shall have the like remedy to recover all the estate, debts and effects in his own name as the debtor might have had if the decree in bankruptcy had not been rendered and no assignment made," &c.

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(Sec. 5047). It has never before been claimed in this state that any such leave of the court was necessary. It seems a novel proposition to maintain in a state court that its "jurisdiction" to entertain such an action depends upon the permission or direction of the Federal courts.

II. An assignee in bankruptcy may maintain an action for partition. The assignee gets this right because he becomes by the transfer to him the absolute owner of the property for the purposes of the trust, and is, by the act, given "the like remedy to recover all the estate, debts and effects in his own name, as the debtor might have done if the decree in bankruptcy had not been rendered and no assignment made" (Sec. 5047). The assignee has even greater rights than the bankrupt would have had as to the bringing of actions, for he may bring actions to set aside transfers by the debtor in fraud of his creditors. The objection suggested in *Dubois agt. Cassidy* (75 N. Y., 299) that a receiver in supplementary proceedings cannot maintain an action for partition is founded upon a reason not applicable to the case at bar. Such a receiver is only authorized to take sufficient property of a debtor to satisfy the judgment under which he was appointed. He has not general title to the property unless a conveyance is made to him by the debtor under the order of the court; and even then his office would terminate upon satisfaction of the judgment under which he acts. This distinction is pointed out in *Bostwick agt. Menck et al.* (40 N. Y. [1 Hand], 383). See, also, *Scott agt. Elmore* (10 Hun, 58); *Chautauque County Bank agt. Risley* (10 N. Y., 370). Such a receiver cannot maintain an action to set aside a general assignment by the judgment debtor as fraudulent against creditors for the reason above stated (*Bostwick agt. Menck, supra*). But an assignee in bankruptcy may maintain such an action because he has a general title (*Chemung Co. Canal Bank agt. Judson*, 8 N. Y., 258). An assignee in bankruptcy may even maintain an action to remove a cloud upon his title (*Beers agt. Place*, 36 Conn., 578), or to vacate a transfer of property,

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although he is in possession of it (11 *N. B. R.*, 121); and an assignee under a general assignment for the benefit of creditors may maintain an action for partition (*Van Arsdale* agt. *Drake*, 2 *Barb.*, 600). This is direct authority for the case at bar and is cited as authority by our own general term in the case of *Gallie* agt. *Eagle* (65 *Barb.*, 587). The necessity for such a power is apparent in the case at bar. The land will sell for nothing unless the assignee's right to it is determined. No purchaser of real estate would buy an undivided share of such a farm, especially when the assignee's right to sell was disputed and the purchaser would know he was buying a law suit. As was stated by plaintiff's counsel on the trial, so far as the defendant is concerned, this is a friendly action simply to determine whether defendant shall pay the purchase-price to the assignee or to the bankrupt. A decision that the court will not entertain the action will leave the parties where they started and make both a sale and another partition suit necessary.

III. The two years' limitation of the bankruptcy act has no application to such a case as this. The adverse claim referred to in the bankruptcy act is not an adverse claim by or under the bankrupt (*Clark* agt. *Clark*, 17 *How.*, 315; *Pickett* agt. *McGarrick*, 14 *N. B. R.*, 236). But as decided by our court of appeals this section refers only to suits growing out of disputes in respect to property and rights of property of the bankrupt, and "to which adverse claims existed while in the hands of the bankrupt and before the assignment" (*Stephens* agt. *Hauser*, 39 *N. Y.*, 309, 310). And the United States supreme court at the October term, 1878, adopt the same construction (*Phelps, Assignee, &c.*, agt. *McDonald*, 19 *N. B. R.*, 192). No statute of limitations would, however, have any application to an action for partition. The assignee was, in contemplation of law, in possession of this property. The doweress died only six months before this action was commenced, and Hewey's title was made only the day before the commencement of the

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action. The bankrupt has had no possession nor interest in the property since he conveyed this property for the benefit of creditors June 30, 1874, through his bankruptcy proceeding. Without a discontinuance of the bankruptcy proceedings he can never have title again to the property except through the assignee (*Diedrich agt. Allen*, 10 *Humph.*, 588; *Bumps' Bankruptcy* [9th ed.], page 553).

IV. The plaintiff should have the relief demanded in the complaint. This land belongs to the creditors of the bankrupt. The late bankruptcy act has been called many hard names and has been justly charged with many faults, but we think it was never before claimed, especially in a court of equity, that under this act a bankrupt may be discharged before distribution of his estate and then turn around and take from the assignee the entire estate which he has transferred to an assignee for the benefit of his creditors as a condition of receiving his discharge.

Mr. A. P. Ferris and *Mr. Kingsley*, for defendants.

MACOMBER, J. — The case of *Cook agt. Whipple* (55 *N. Y.*, 150) decided that this court has jurisdiction in all actions, legal or equitable, brought by an assignee in bankruptcy to recover the estate of the bankrupt, or to determine rights to property claimed by him as such assignee, or in any way affecting the same, and that the jurisdiction conferred upon the Federal courts by section 1 of the bankrupt act was not exclusive. Nor does the subsequent amendment of that section, passed June 22, 1874, affect the statute so as to impair the authority of that decision. The amendment consists only in adding the following clause to the section :

“*Provided*, that the court having charge of the estate of any bankrupt may direct that any of the legal assets or debts of the bankrupt, as contradistinguished from equitable demands, shall, when such debt does not exceed five hundred dollars, be collected in the courts of the state where such bankrupt

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resides, having jurisdiction of claims of such nature and amount."

No direction was given by the district court that this action should be brought in the state court, nor was such direction necessary. The amendment in no respect made the jurisdiction of the Federal courts exclusive, when it was not exclusive when the decision of *Cook* agt. *Whipple* was rendered. It simply conferred upon those courts the power which they did not possess before its passage of directing, of their own motion, that certain actions be prosecuted in the state courts. The supreme court of this state possesses general jurisdiction by the Constitution and the laws of all cases in law and in equity.

In what manner or in what place a party acquires the legal rights which he proposes to enforce is quite immaterial so long as the jurisdiction of the court has not been denied, as it may be in a limited class of cases where the Federal Constitution and the Federal laws have made the jurisdiction of United States courts paramount and exclusive. To hold that the proviso above quoted affected the jurisdiction of this court would make jurisdiction of a state court dependent upon the will of a judge of the Federal court.

The only other question which I deem of sufficient importance to advert to is whether an assignee in bankruptcy may be permitted to maintain an action for partition.

The appointment of the plaintiff as assignee of David Dennis, and the transfer to him, clothed him with the title to all of the property of the bankrupt. He became the absolute owner of the bankrupt's estate, both real and personal, for the purposes of his trust.

He became a tenant in common with the other part owners of the lands described in the complaint. It is true it was not necessary for him to bring this action for the purpose of having his share set off to him, for by the bankrupt act, he was empowered to sell his interest while it was undivided. He was already possessed of it as effectively as the bankrupt himself was possessed of it before the adjudication in bankruptcy

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and the assignee's title was undisputed. Yet the court cannot properly say, as it seems to me, that the assignee was bound to proceed in that way. He may have believed, with reason, that a sale so made would not be so advantageous to his estate as an actual partition and a sale of the portion set off to him. In such case the assignee has, in my judgment, the right, and it is his duty, to bring a suit for a partition of the lands. Section 5047 declares that "the assignee shall have the like remedy to recover the estate, debts and effects in his own name, as the debtor might have done if the decree in bankruptcy had not been rendered and no assignment made."

In *Dubois agt. Cassidy* (75 *N. Y.*, 302) it was doubted whether a receiver appointed in proceedings supplementary to execution acquired such a title to real estate as to enable him to maintain an action of partition. But that suggestion rested upon the particular nature of the estate which such a receiver has. He is not clothed with the general title to the debtor's property unless a transfer has been made to him by the debtor either voluntarily or by an order of the court. But an assignee in bankruptcy stands to the estate of the bankrupt as does an assignee under a voluntary and general assignment for the benefit of creditors to the estate of the assignor. He becomes the absolute owner of the entire estate for the purpose of distributing the same to all of the creditors ratably. In *Van Arsdale agt. Drake* (2 *Barb.*, 600) it was held that an assignee under the state insolvent act could maintain an action for the partition of the debtor's real estate.

As to the point that the action is required to be brought within two years it is sufficient to say that the suit is not to recover property in dispute, or to which there is any adverse claim, but it is brought for the purpose of getting it into a situation where it will bring the largest sum to the estate.

A point is also made by the counsel for the defendants that the discharge of the bankrupt restored to him this property, but manifestly this position is wholly untenable.

I must conclude that the plaintiff is entitled to the relief

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demanded in the complaint, with costs chargeable upon the property or upon the fund in case a partition cannot be had and a sale is directed.

SUPREME COURT.

DANIEL W. FISH agt. ISAAC M. HOSE and another.

Pleading — Complaint — when it is sufficient — Misjoinder of parties defendant — Demurrer — Code of Civil Procedure, section 488.

In an action against two defendants a complaint will not be held defective on a joint demurrer by both, put upon the ground that it does not state facts sufficient to constitute a cause of action, if it states a cause of action against either.

That there is a misjoinder of parties defendant is not a ground of demurrer. The defect of parties defendant, for which a demurrer may be interposed, is a deficiency.

Special Term, April, 1880.

DEMURRER to complaint.

A. J. Perry, for defendants.

Hawkins & Cothren, for plaintiff.

VAN VORST, J. — This is a joint demurrer by the defendants. The plaintiff has clearly a cause of action against the defendants, *separately*. The demurrer takes the objection that the facts stated do not constitute a cause of action against the defendants, jointly or severally.

But in an action against two defendants the complaint will not be held bad on a joint demurrer by both defendants, put upon the ground that it does not state facts sufficient to constitute a cause of action, if it states a cause of action against

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either (*Phillips* agt. *Hagadorn*, 12 *How. P. R.*, 17; *Eldridge* agt. *Bell*, *idem*, 547).

In order to have reached the true ground of objection which is argued in this behalf the demurrer should have assigned as grounds thereof that causes of action had been improperly united (*Jackson* agt. *Brookins*, 5 *Hun*, 531).

It is objected by the demurrer that there is a misjoinder of parties defendant.

But no such objection can be taken by demurrer. The defect of parties defendant, for which a demurrer may be interposed, is a deficiency (*Code Civil Procedure*, sec. 488, subs. 5 and 6; *Peaboddy* agt. *Washington Co. Mutual Ins. Co.*, 20 *Barb.*, 339; *Richtmyer* agt. *Richtmyer*, 50 *Barb.*, 55).

There should be judgment for the plaintiff on the demurrer, with liberty to the defendants to answer on payment of costs.

SUPREME COURT.

WILLIAM BARNES agt. THE ATLANTIC MUTUAL LIFE INSURANCE COMPANY and EDWARD NEWCOMB, as receiver thereof.

Insolvent insurance company — Receiver — Power of the court to order payment to counsel employed by the company out of funds in the hands of the receiver though they were unsuccessful in the litigation.

The superintendent of the insurance department made a report in reference to The Atlantic Mutual Life Insurance Company, in pursuance of the laws of 1869, and on this report the attorney-general instituted the usual proceeding to wind up the company and place its effects in the hands of a receiver, and an order appointing a receiver was made. At the commencement of these proceedings the plaintiff, in behalf of the insurance company and upon and by virtue of an employment of its appropriate officers, undertook to and did defend the proceedings up to the time of the appointment of the receiver. With the decision appointing a receiver the company was not satisfied, it still insisted on its solvency and right to transact its own business; and although the defendant Newcomb, who was appointed receiver, at once filed his

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bond and took possession an appeal from the order was taken by the plaintiff acting as attorney of the company; and various other proceedings were had, in all of which the plaintiff appeared for and conducted the same for and on behalf of the company:

Held, that an action is properly brought and may be maintained by the attorney against the company and the receiver for his services, disbursements and expenses, and the court has power to order payment to the plaintiff out of the funds in the hands of the receiver.

Held, further (after reciting the history of the proceedings taken by the company and the further fact that all these proceedings were taken in good faith by the company and its counsel, and in the honest and conscientious belief of its solvency and ability to manage its affairs without the intervention of the court), that under such circumstances the managers and officers of the company not only had the right but it was their duty to do what they could to keep it in life; and the plaintiff having been employed by the company the court ought to exercise such power and order payment to the plaintiff out of the funds in the hands of the receiver.

Held, also, that the objection urged by the defendant that this action by the company, these various proceedings that were had after the appointment of a receiver, must be regarded as a violation of and as prohibited by the order appointing the receiver and, therefore, contemptuous, is clearly untenable. The company are in no position to raise such a question. They having employed counsel and urged on these proceedings they cannot now object to the counsel receiving any compensation for his labor, or reimbursement for his expenses, because they were violating the order of the court when they employed and directed it to be done.

Nor is the plaintiff's claim barred by any previous action taken by the court as to the allowance of costs. The appellate courts could make no provision except for taxable costs which, from the proof in this case, would afford no adequate compensation for the labor performed and the disbursements incurred.

Albany Special Term, May, 1880.

R. W. Peckham and William Barnes, for plaintiff.

Henry Smith, for receiver.

William G. Weed, for company.

OSBORN, J. — This cause was tried before me at an adjourned Albany circuit without a jury. There is no disagreement as

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to facts. There is no doubt that the plaintiff, or the firm of which he was a member, in behalf of the defendant The Atlantic Mutual Life Insurance Company, and upon and by virtue of the employment of its appropriate officers, rendered the services and incurred the disbursements and expenses specified in the schedule annexed to the complaint. That the value of the services rendered amounted to the full sum charged is testified to by two disinterested witnesses, and is not contradicted by any evidence in the case. Notwithstanding this the defendants assert that the plaintiff cannot maintain this action and is not entitled to the relief demanded, or to any part thereof.

The company appears by Mr. William G. Weed and insists that no judgment can pass against it for the reason that all the services and disbursements charged for were after it had been placed in the hands of the defendant Newcomb, as receiver, and that it could not, therefore, legally incur any such liability and had no authority for contracting with the plaintiff or his firm for the rendition of any such services, &c. Here let me say that the plaintiff, by an assignment of his partner, has become the sole owner of the claim in suit and so brings the action in his individual name. The claim of the company is, to say the least, somewhat novel. It must be that it is founded on the notion that the usual injunction clause in the order appointing the receiver so far prohibited the company from acting or transacting any business as to make its action in the employment of attorneys and counsel illegal and invalid, and so exonerate it from all liability to the plaintiff for the great amount of labor performed and disbursements and expenses incurred, and which is the subject of this controversy. This is the position of the company as nearly as I could ascertain its position on the trial and argument, and, as I stated before, is somewhat novel in pleading a disregard and violation of an order of this court as an excuse or defense for its acts.

The defendant Newcomb, as receiver, appears in the action

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through his counsel, Hon. Henry Smith, and interposes a defense much more plausible and presenting questions somewhat troublesome and worthy, at all events, of the most careful and serious consideration. He insists that all the services and disbursements for which the plaintiff seeks to recover, and which he asks shall be declared a lien upon the funds in the hands of the receiver and paid therefrom, were in fact after the receiver had been regularly appointed, filed his bond and taken possession of the assets of the company as the court's officer, and for the benefit of and in the interest of the great number interested in the fund, there can be no recovery as against the receiver or to reach the fund in his hands. He further says that all these services were performed and expenses incurred in proceedings and litigations hostile to the receiver and to the order of the court appointing him. In view of these facts it is forcibly urged:

1st. That the court has no power to direct the amount of the plaintiff's claim created in acting for the company in a hostile and unsuccessful proceeding to be paid out of the funds in the hands of the receiver. That no authority for such an order can be found in the act providing for the appointment of receivers under which the proceedings were instituted by which Newcomb was appointed, or elsewhere, but in fact that it would be in contravention to the act specially providing for the disposition of the funds (*Laws* 1869, *chap.* 902).

2d. It is further urged on the part of the receiver that if the court has such power it ought not to be exercised; that the court has taken the funds and assets of the company out of its hands and put them in charge of its (the court's) officer because of the company's mismanagement, and that it would be unjust to compel policyholders to pay counsel in trying to defeat the proper order of the court; and,

3d. That whatever power or discretion the court may have had over this fund in awarding compensation to plaintiff was determined on the decision of each successive proceeding.

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When these objections, so ingeniously put and ably and forcibly urged by the learned counsel for the receiver, are satisfactorily met and answered, together with the one first suggested, and which is also insisted upon by the receiver, to wit, that every step taken by the plaintiff for this company for which he sues was a violation of the restraining and injunction order of the court appointing the receiver, we shall have but little difficulty in arriving at a proper disposition to be made of this case.

In order to determine these various questions intelligently a very brief statement of facts may be profitable.

The defendant "The Atlantic Mutual Life Insurance Company" commenced its existence and business in the year 1866. It had, in May, 1877, \$1,100,000, or thereabouts, as assets, and thousands of policyholders. It had been, as these figures show, doing a large and extensive business during all the years from 1866 to 1877, and its managers enjoyed the confidence and respect of all who were interested.

On the 9th day of May, 1877, the superintendent of the insurance department made a report in reference to it in pursuance of the laws of 1869 above cited. On this report the people, by the attorney-general, on the 11th day of May, 1877, instituted the usual proceeding to wind up the company and place its effects in the hands of a receiver.

On the return day of the order to show cause the company appeared by the plaintiff and others as counsel to resist the application. The company insisted that there was nothing in its condition to warrant the interference of the court. Mr. justice WESTBROOK, before whom these proceedings were had, would not, or did not, appoint the receiver upon the paper presented but took testimony as to its actual condition, and so small was the amount of the alleged deficit that time was afforded to make up the same. This, it seems, was not done, and it was not until August 6, 1877, that the order appointing a receiver was in fact made.

Up to this point the plaintiff, or his firm, were paid for

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their services, except Stein, in bill No. 1. But with this decision the company was not satisfied. It still insisted on its solvency and right to transact its own business; and although the defendant Newcomb, who was appointed receiver, at once filed his bond and took possession, an appeal from the order was taken to the general term and the order affirmed, "with ten dollars costs and printing disbursements, to be paid out of any funds in the hands of the receiver, now or hereafter." From this order an appeal was taken to the court of appeals, which court affirmed the order of the general term, so far as the appointment of a receiver was concerned, but modified the order in important particulars, as will be seen by a reference to the order of that court, and then directed the costs of the company, as well as of the attorney-general, to be paid out of the funds in the hands of the receiver. But this, of course, only related to the taxable costs, which would be inadequate to compensate the attorneys of the company.

The next step in the case seems to have been an opposition by the company to the confirmation of the actuary's report. Because of this the report was sent back for revision, and when, after much time and labor, a modified report was made, though still opposed, it was confirmed with no provision as to costs. From this an appeal was taken by the company to the general term, where the order was affirmed and no provision made as to costs. An appeal from this to the court of appeals was dismissed without costs to either party.

Then followed a motion on behalf of the company to discharge the receiver and to be restored and reinstated to its assets and so go on and transact its own business.

The company all through these various legal proceedings insisted, and down to the time of this trial still insisted, that it was solvent and ought not to be interfered with in the conduct and management of its business. But this motion was denied with no provision as to costs. An appeal was taken to the general term, and, if I mistake not, the attorney-general also appealed from this last order, but the general term

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affirmed the order, with costs and printing disbursements, to be paid to the receiver by the people. On appeal to the court of appeals the general term order was affirmed, without costs to either party.

I have not these various orders before me, but I think I have given them correctly and in the order in which they occurred. Certainly they are given with sufficient accuracy for my present purpose.

Thus it will be seen that there were three separate proceedings growing out of the appointment of a receiver for this company, all of which were bitterly and stubbornly resisted and opposed, and in none of them was there a cessation of legal warfare until the court of last resort had been appealed to. Although the company was substantially defeated at each successive step in the litigation it is entirely clear to my mind, from all the circumstances as well as positive evidence in the case, that it was acting fairly and in good faith under the advice of able lawyers, and with a well-settled conviction of its solvency and ability as well as right to transact its own business.

The court, upon the first application, was evidently embarrassed from the papers presented as to its duty in the premises and so took oral evidence of its condition.

It is, perhaps, the only application ever made for the court's interference in the affairs of an institution of over a million of dollars of assets where the alleged deficit was for so small an amount.

I mention this not as an intended criticism on the action of the court; by no means. I do not question the correctness of its action, but only to show that there was good ground for the action of the company and that it and its advisers acted in good faith in the premises.

The proof is clear that the services and disbursements were rendered not only with the knowledge and assent of the company but on its express employment and the plaintiff ought to be compensated therefor. That his right to recover against

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the company in an ordinary action at law for these services and disbursements is entirely clear. But such a recovery alone would avail nothing. The funds and assets are now all in the hands of the defendant Newcomb, as receiver, and so the action is brought in this form and the equitable power of the court invoked in order that the plaintiff may obtain what is his just due.

And this brings us now to consider the legal questions involved; and, first, has the court any power to order payment to the plaintiff out of the funds in the hands of the receiver? I grant that this action is somewhat novel, and, perhaps, no case can be found entirely analogous; but there are certain familiar principles, well understood, with very many adjudications of the courts in this and other states so similar in principle that I have come to the conclusion that such power exists, and in a proper case can and should be exercised. It must be constantly borne in mind that the funds or assets of the company are now under the control of the court. The receiver is its officer. Not one dollar of it can be paid out properly without the authority of the court. Thus it would seem, as an original question, that there was, and of necessity must be, a power inherent in the court to give such direction as to the disposition or distribution of the fund as shall seem to be just and equitable. We are not, however, left without precedent or authority. In the very proceedings taken by the company and above referred to in the order in which they occurred it will be seen that the court of appeals recognized this doctrine and directed the costs of the company in that court, though unsuccessful, to be paid out of the funds in the hands of the receiver. So, also, in the case of this very company, an effort was made by certain parties interested, as appears by one of the orders on file and the report of the receiver to the legislature, after the appointment of the receiver to put it (the company) into bankruptcy, and the costs, counsel fees and expenses of the receiver were ordered paid out of the fund.

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So, also, numerous cases could be cited and precedents given to show that the court has granted costs, counsel fees and expenses out of the fund to lawyers in life insurance dissolution cases appearing merely for creditors and policyholders.

The same firm who rendered the services in suit were allowed by an order of the court \$1,500 for professional services rendered on the retainer of policyholders in the Continental Life Insurance Company, and the same or its payment charged upon the fund.

The general term in the first department, as I am advised, made an order in the case of the Security Life Insurance Company that the intervening policyholders were at liberty to make application to the court for an order directing payment of the costs and expenses of the action or actions brought by them out of the funds or assets in the hands of the corporation in priority to other claims. In the case of *Van Schmidt* agt. *Huntington* (1 *Cal. R.*, 56) it was held "that where it was for the interest of all parties concerned that the company should be legally dissolved the costs and a counsel fee on each side should be paid out of the fund." And the power of the court over funds in its hands to award costs to be paid out of the fund to both parties asserting a claim thereto, has often been recognized in cases where a bill of interpleader has been filed (*Atkinson* agt. *Marks*, 1 *Cowen R.*, 693; *Badeau* agt. *Rogers*, 2 *Paige*, 209; *Richardson* agt. *Sutton*, 6 *Johns. Ch.*, 445; *Canfield* agt. *Sterling*, 1 *Hopk.*, 224).

A great variety of equitable actions can be found involving conflicting rights and interests to a particular fund or in a particular state where the power of the court to award costs to a party, though unsuccessful, has been recognized and established. Indeed, it is now so well adjudicated as to be beyond question; for instance, actions by legatees to enforce trusts under a will, actions for the construction of a will and many others that might be found. In mortgage foreclosures and partition actions, when there is reasonable ground for an appearance, answer and defense by a party, though unsuccessful

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ful, it is a very common thing to award costs out of the proceeds of the sale of the property to the attorney for the unsuccessful litigant. So familiar is the rule in equity cases or proceedings that the power of the court over costs is in its own discretion that it is rarely, if ever, the subject of review; without further reasoning or reference to authority, it seems to me clear that the court has the power in this case to award the amount which the plaintiff is entitled to recover out of the funds in the hands of the receiver, and for such purpose that the action is properly brought in its present form and the receiver properly made a party defendant.

Assuming this to be so the next question that arises, ought the court to exercise such power in this particular case? With a view of answering this properly I have already recited the history of the proceedings taken by the company, and the further fact that all these proceedings were taken in good faith by the company and its counsel, and in the honest and conscientious belief of its solvency and ability to manage its affairs without the intervention of the court. Believing this, what was the duty of the company? Was it to submit passively? Would it have been justified in allowing its management and operations to be taken from it without resistance and its corporate existence wiped out? I think not. Indeed, the company was partially successful in the court of appeals on the appeal from the order of the general term affirming the special term order appointing a receiver. The court of appeals modified that order so "as not to dissolve the corporation, and so as not to give the securities deposited with the superintendent of the insurance department to the receiver." The fact that the court refused to appoint a receiver in the first instance on the papers presented but waited for other and further proof and to give an opportunity to make up the comparatively small deficit as claimed by the attorney-general; the modification of that order when made by the court of appeals; the fact that the attorney-general united in the appeal from the order subsequently made denying motion to

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discharge the receiver and to restore the company its property and assets so that it might continue its business, all tend to show that the affairs of this company were in a situation entirely different from many, perhaps from any other that has been given over to a receiver, and that it was a debatable question, to say the least, as to whether it should be interfered with by the court. Undoubtedly its (the court's) action was proper and right, but the right was not so clear as to make resistance thereto by the company unreasonable or open to the suspicion that its action was not taken all through in good faith, with fair grounds to hope for success. Under such circumstances I think the managers and officers of the company not only had the right but that it was their duty to do what they could to keep it in life (*Sheldon Hat Co. agt. Eckmeyer Hat Co. and others*, 56 How. Pr. R., 70; *Copeland agt. Citizens' Gas Co.*, 61 Barb., 605, and *Abbott agt. American Hard Rubber Co.*, 33 Barb., 538).

Another objection urged by the defendants that this action by the company, these various proceedings that were had after the appointment of a receiver, must be regarded as a violation of and as prohibited by the order appointing the receiver and, therefore, contemptuous, is clearly untenable. The language used warrants no such construction, and certainly no such thing could have been intended. As I said in the commencement of this opinion the company are in no position to raise such a question. It hardly lies with it or its officers now to say: True, we employed counsel and urged on these proceedings, but we now object to the counsel receiving any compensation for his labor or reimbursement for his expenses because we were violating the order of the court when we employed and directed it to be done.

The only other objection urged by the learned counsel for the receiver is, that if the court has or had any power over this fund, so far as the payment of the costs of the company is concerned, the same has been passed upon and determined by each successive proceeding. This cannot be sound.

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The appellate courts could make no provision except for taxable costs, which, from the proof in this case, would afford no adequate compensation for the labor performed and the disbursements incurred.

So, also, it has in the same sense passed upon the receiver's costs and disbursements, but who doubts for a moment that the court can direct payment out of the fund (if it has not already done so) of a fair and reasonable sum to the counsel for the receiver for his costs, counsel fee and disbursements in the matter. I feel not the slightest embarrassment from this objection; if I am right in the main propositions discussed I am confident the plaintiff's claim is not barred by any previous action taken by the court as to the allowance of costs.

It follows from the views expressed that the plaintiff is entitled to the relief demanded in the complaint. The amount seems large, very large to me. I am aware of the well known and conceded ability of the plaintiff as a lawyer, and particularly in cases and proceedings of a character in which the services were rendered for which this action is brought. I can appreciate the great amount of labor and research bestowed and the large amount of money necessarily expended in printing and other expenses. Still, in view of the fact that the value of these services so rendered and charged were sworn to be fair and reasonable by disinterested witnesses offered by the plaintiff, and even \$2,000 less than their actual value, and that no witness was called on the part of the defendant, or either of them, to question the same, I do not feel justified in departing from undisputed testimony to fix a different sum or amount.

The conclusions to which I have arrived have been hastily written but were not reached until after the most careful examination and investigation of the case, and the authorities to which my attention was called and others consistent with other official duties.

As I have stated the action is somewhat novel and not

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entirely free from embarrassment. The interesting questions raised and the large amount involved demand and will doubtless receive the most careful consideration of the highest appellate tribunal, and when a decision thereon shall have been pronounced by that tribunal important principles will be settled as to which some doubts may now exist.

Judgment is ordered for the plaintiff for the amount and interest demanded in the complaint, and in the manner claimed, together with costs.

COURT OF APPEALS.

In the Matter of the Assignment of JOHN W. LEWIS for the benefit of his creditors.

Assignee — his duty as to payment of taxes on assigned real estate.

An assignee for the benefit of creditors is not required, pending an action for the foreclosure of a mortgage made by his assignor, where the mortgagees have possession of the mortgaged lands, through a receiver, to pay taxes in arrears when the mortgaged lands are insufficient security.

June, 1880.

FINCH, J. — The assignor in this case, in 1876, executed his bond and mortgage to Upham & Tucker, as trustees, to secure a debt due to them of \$25,000. In 1879 he made a general assignment to John A. Davenport, in trust, to pay certain preferred creditors in full, or ratably, and out of any surplus remaining to pay the balance of his indebtedness in full, or so far as the assigned estate would allow. The mortgage contained a provision that upon failure to pay interest or taxes the whole mortgage debt, at the option of the creditor, should become due. That emergency arising the mortgagees commenced an action for the foreclosure of their security, and through the intervention of a receiver appointed upon their

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motion became possessed of the mortgaged lands pending the foreclosure. It appears that Lewis having failed to pay the taxes of 1877, 1878 and 1879, and a Croton water tax, the mortgagees presented their petition to the court of common pleas of the city of New York reciting the foregoing facts and asserting that the mortgaged lands were an insufficient security for the debt and asked for an order that the assignee should pay and discharge the taxes in arrear. The assignment contained no provision giving any preference to taxes, or directing their payment at all, except as embraced in the general unpreferred debts of the assignor. The prayer of the petition was denied, and the order thereupon entered was afterwards affirmed by the general term.

We think the motion was properly decided. The assignee derives all his power from the assignment, which is both the guide and measure of his duty. Beyond that, or outside of its terms, he is powerless and without authority. The control of the court over his action is limited in the same way and can only be exercised to compel his performance of the stipulated and defined trust and protect the rights which flow from it. He distributes the proceeds of the estate placed in his care according to the dictation and under the sole guidance of the assignment, and the statutory provisions merely regulate and guard his exercise of an authority derived from the will of the assignor. The courts, therefore, cannot direct him to pay a debt of the assignor, or give it preference, in violation of the terms of the assignment and the rights of creditors under it. To hold the contrary would be to put the court in the place of the assignor and assert a right to modify the terms of the assignment, after it had taken effect, against the will of its maker and to the injury of those protected by it. We agree that the assignee is merely the representative of the debtor and must be governed by the express terms of his trust (*Nicholson agt. Leavitt*, 6 *N. Y.*, 519). The case is not like those to which our attention was asked of the distribution of a decedent's or a bankrupt's estate. There the law dictates

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the distribution, because in the one case the decedent did not do it during his life, and in the other by force of direct enactment the court takes possession of the estate which the bankrupt is unable to hold. But in cases of general assignment the right to control the distribution remains as yet in the assignor.

It is claimed that taxes constitute a debt due to the state and are entitled to preference in payment from an insolvent's effects. That they constitute a debt which the insolvent owes is true, and possibly an abstract right to a preference may belong to the state. But it is not necessary to discuss or determine that question, for the state is not here asserting any such claim. It has been content to rely upon its usual and ordinary modes of collection, and neither to assert nor enforce any such preference. It may never do so; and while it does not we fail to see how an individual can interfere in its behalf. It is not for the plaintiff to say when or how it shall drive its rights to results, or assume to vindicate an authority it chooses not to exert. Nor can the assignee, upon the petition of these mortgagees, be required to pay the taxes and water rent accrued since the assignment. If compelled to do so by state or municipal authority he might be allowed the expense. Until then his duty to those interested in his trust requires a different action. They would have a right to insist that he should not incur a needless expense which produced no benefit to the fund but lessened it without necessity. The preference of the state, if it has any, is quite as much over the claim of these petitioners as over those of the general creditors, and we do not discover the equity which would lead us to enforce it against the latter for the benefit of the former.

The order should be affirmed.

All concur.

Oregon Steamship Company agt. Otis.

SUPREME COURT.

OREGON STEAMSHIP COMPANY agt. GEORGE K. OTIS.

Power of referee to amend pleadings.

A referee has the same power to allow amendments to any pleading as the court, upon such trial, upon the same terms and with like effect, and the matter being properly at his disposal, his action will not be reviewed by a judge at chambers

At Chambers, July, 1880.

In this suit the plaintiffs alleged that defendant, as their agent, made a contract with the United States for the transportation of the mails between San Francisco, California, and Portland, Oregon, from June, 1874, to June, 1878, for \$100,000, for which service he was to have \$2,500, but that he collected the whole amount and failed to account for \$13,456.25, for which judgment is asked. The case is now on trial before Horace Ruggles, as referee. The plaintiffs, after closing their case, asked leave to amend their complaint so as to allege that defendant made the contract for himself and then employed plaintiffs to perform the service, for which he agreed to pay them ninety-seven and one-half per cent, and that \$13,456.25 was due and unpaid. The referee denied the application, holding that a referee did not possess the power under the Code to make an amendment of the character proposed, which he said was not simply conforming the pleadings to the proofs nor correction of a variance between pleading and proofs, but a substitution of a new and different cause of action for that now set forth in the complaint. While the complaint in its present form was for money had and received the amendment changed it to one for work, labor and services. A motion was then made before judge DONOHUE, in supreme court cham-

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bers, to allow the amendment, it being claimed that this would not be reviewing the referee's decision as he had placed his refusal upon his want of power. Judge DONOHUE denied the motion, holding that "the referee had the power to make an amendment. The matter was properly in his disposal and his action cannot be reviewed by me," citing 75 *New York*, 122.

N. Y. COMMON PLEAS.

MARY F. KERR agt. WILLIAM J. KERR.

Divorce—allowance to wife—Change of decree as to support of children.

Where a decree of divorce has been obtained by a wife against her husband and an allowance of alimony has been made for her support and "for the support and maintenance" of her three children:

Held, that the legislature intended that the allowance to the wife should be unchanged, but that the provision for the support of the children might be altered as their circumstances changed.

Special Term, July, 1880.

VAN HOESSEN, J. — In *Miller* agt. *Miller* (6 *J. C. R.*, 91), chancellor KENT said, that as the statute spoke of such maintenance or allowance as to the court shall "from time to time" seem just and reasonable, it was, perhaps, in the power of the court to vary the allowance provided for by the final decree. It will be seen that the chancellor rested the power to vary the allowance upon the words "from time to time." They are not to be found in the Revised Statutes, and the fair conclusion seems to be that the court has no power to vary the allowance to the wife. In the case of *Lamport* agt. *Lamport* (decided by the general term of the fourth department and reported in the fourth *Albany Law Journal*, 190) judge JOHNSON held that the power to vary the allowance was not only

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given by the statute but was necessarily, whether expressed *in totidem verbis* or not, reserved to the court by the very nature of the decree, and that if the plaintiff wife caused a judgment to be entered which did not give the defendant husband leave to apply for a reduction of the allowance the court would, nevertheless, entertain the husband's application.

The decision in *Lamport* agt. *Lamport* was made in 1871, three years before the court of appeals set the question at rest by its decision in *Kamp* agt. *Kamp* (59 *N. Y.*, 212). The views of judge GROVER in the *Kamp* case respecting the power of the court to vary the judgment granting an allowance to the wife in an action for an absolute divorce, where no leave to apply for a change of the allowance was contained in the judgment, were adopted by the court of appeals and must govern this application. The case of *Park* agt. *Park* (18 *Hun*, 466), which was affirmed by the court of appeals, does not touch the point under consideration.

In *Kamp* agt. *Kamp*, judge GROVER drew a distinction between the power of the court to change the allowance to the wife and its power to vary the provision for the care and maintenance of the children, and founds his opinion upon the language of the statute.

The learned judge clearly shows that the legislature intended that the allowance to the wife should be unchangeable, but that the provision for the support of the children might be altered as their circumstances changed. It was not intended that a daughter who grew to womanhood and became a wife, or a son who grew to manhood and embarked in business, should continue to be forever a charge upon the father. Hence, the language of section 59, 2 Revised Statutes, 148, declares that during the pendency of an action for divorce, or at its final hearing or afterwards, as occasion may require, the court may make such order for the care of the children as may seem necessary and proper, and may at any time thereafter annul, vary or modify such order. The statute is silent as to the varying of the allowance to the wife, and the court is left,

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therefore, to pursue, in actions for divorce, the ordinary practice applicable to the modification of judgments in actions of an equitable character.

It being settled by the decision of the court of last resort that the power to change the provision for the support of the children exists I think it should be exercised in this case, provided there be no encroachment on the rights of the wife. There is no doubt that the sum of \$1,800 awarded by the judgment was for the maintenance of the children as well as an allowance to the wife. On the hearing before Mr. Bartholomew O'Connor, the referee who took proof of the facts alleged in the complaint, this question was put to the defendant by the plaintiff's counsel: Are you able to pay to Mrs. Kerr and her children the sum of \$1,800 per annum? The answer was that he thought he could not spare more than \$1,500, but that he would endeavor to supply \$1,800. The three children were at that time (1863) very young, the eldest being a boy of fourteen, the second a girl of eleven and the youngest a girl of seven. The son has now become a man of thirty-one and the youngest daughter is twenty-four. The son is in business and has said that he was doing well. He ought not to be a charge upon his father. The daughters are unmarried and it appears that the defendant does not wish them to teach or, it may be inferred, to engage in any other business.

It is not possible to say exactly how much the court intended as an allowance to the wife and how much as a provision for the children, and that is the real difficulty in this case. Surely I am not at liberty to guess at the amount which the court, when it pronounced judgment, thought a fair and reasonable allowance to the wife, nor have I the right arbitrarily to assume that the sum which I think the proper one was the very amount which the court must have intended to award. I cannot interfere with the wife's allowance, and not having anything to guide me I might encroach upon that allowance if I should make any reduction in the amount which the judgment orders the defendant to pay.

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I shall decline, therefore, to grant the application and leave the defendant to his appeal from the order to be entered denying his motion.

I award no costs.

SUPREME COURT.

ALICE McCOSKER, administratrix, agt. THE LONG ISLAND RAILROAD COMPANY.

Master and servant — Negligence — Distinction between a servant and a representative of a corporation.

A corporation is liable to an employer for negligence or want of proper care in respect to such acts and duties as it is required to perform as master or principal, without regard to the rank or title of the agent or representative entrusted with their performance.

As to such acts the agent or representative occupies the place of the corporation, and the latter is deemed present and consequently liable for the manner in which they are performed.

Accordingly, *held*, where an agent of defendant who was a yard-master and whose duties included the hiring and discharging of drillers as well as the making up of the trains and the distribution of cars in and about the defendant's yard and repair-shop, with knowledge of a broken bumper gave the signal which in the backing of the engine and train that followed caused the death of the plaintiff's intestate who was a driller employed by the defendant, hired by the yard-master and under his immediate supervision and control, that the defendant was liable (*See Murphy agt. The Boston and Albany R. R. Co., ante 197*).

First Department, General Term, May, 1880.

THIS is an appeal from a judgment in favor of plaintiff entered upon the verdict of a jury.

The plaintiff's intestate, a driller in the employ of defendant, was run over and killed by the backing of an engine and train upon a signal given by a yard-master named Luke. The principal defense was that the accident being caused by the negligence of a fellow-servant or employe the company was not responsible.

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Edward C. Sprague, for appellant.

Clifford A. H. Bartlett, for respondent.

BARRETT, J. — The difficulty in this class of cases is in applying well-settled rules to ever-varying facts. That a master is not liable to his servant for the negligence of his fellow-servant is a general principle which now admits of no question, nor is it qualified by the circumstances that the sufferer happens to be inferior in grade to, and subject to the orders of, such negligent fellow-servant. For his own personal negligence, however, the master is as much liable to his servant as he is to a stranger; and he may be guilty of such personal negligence either in *propria personæ* or by the act of an agent, to whom he has exclusively confided his business. In the latter case the agent is treated as the master's *alter ego*. It is not unfrequently a perplexing question whether the person is in reality such *alter ego* or the injured employe's fellow-servant of a superior grade. Upon the solution of that question the decision of the present appeal depends. It is to be observed that the cases draw a distinction between individuals and corporations. The former may in person superintend their own work while the latter necessarily act by and through agents. Nor is such corporate agency confined to the status of a general superintendent. The corporation may have many departments of business or branches of service, requiring in each a competent executive head. So a particular department furnished with a general head may be made up of various minor departments which are the subjects of separate and distinct agencies. Each of the minor agents may be the company's representative and *alter ego, pro hac vice*. Such heads of minor departments must not be confused with foremen, head-brakemen or other upper servants. The test is largely in the power of employing and discharging subalterns, also in the independence with which the function is exercised. Even the latter need not be

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absolute. There may, indeed, be general instructions from the higher agent, yet the subordinate agent may be supreme in the matter of execution. In the case at bar the injury was caused by the negligence of the yard-master Luke. This negligence was direct and personal. With knowledge of the broken bumper he gave the signal which, in the backing of the engine and train that followed, caused the accident. The plaintiff's intestate was a driller employed by the defendant. He had been hired by Luke and was under the latter's immediate supervision and control. Luke's duties included the hiring and discharging of drillers as well as the making up of the trains and the distribution of cars in and about the defendant's yard and repair-shops. We are of opinion that these facts bring the case within the *alter-ego* principle. Luke was not, in any just sense, McCosker's fellow-servant, even of higher grade. There may have been a foreman or head driller coming within this category, but that was not Luke's position. He was responsible head of that division of the service. The making up of trains and the distribution of cars were evidently important details requiring method, arrangement and foresight. For this the company looked to Luke. To insure prompt and unquestioning obedience the power of appointment and removal, so characteristic of the master, were conferred upon him. It is true that he had a superior in the train dispatcher, who in turn was controlled by the general superintendent. But the duties of each were marked and independent. Even the superintendent was naturally under the general direction of the president, while the latter was subject to the board of directors, yet each represented the company in his proper sphere. So, in a minor degree, did the yard-master. He, of course, took his orders from the train dispatcher as to the number, character, time and extent of the trains to be made up. But he executed these orders in his own way, according to methods of his own devising and through servants of his own choosing. That under these circumstances he stood in the place of the company, *pro hac vice*,

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seems to us to be reasonably clear. The cases support this view (*Bickner* agt. *N. Y. C. and H. R. R. R. Co.*, 5 *Hun*, 515; *affirmed*, 49 *N. Y.*, 672; *Laning* agt. *Same*, 49 *N. Y.*, 521; *Flike* agt. *B. and A. R. Co.*, 53 *N. Y.*, 549; *Malone* agt. *Hathaway*, 64 *N. Y.*, 5; *Besel* agt. *N. Y. C. R. R. Co.*, 70 *N. Y.*, 171; *Booth* agt. *B. and A. R. Co.*, 73 *N. Y.*, 40; *Fort* agt. *Whipple*, 11 *Hun*, 586; *Eagan* agt. *Tucker*, 18 *Hun*, 348; and see *Mullen* agt. *Phila. and S. M. S. Co.*, 78 *Penn.*, 26; *Railway Co.* agt. *Lewis*, 33 *Ohio*, 200; *Railroad Co.* agt. *Keary*, 3 *Warren & Smith [Ohio]*, 209 *et seq.*; *Dobbin* agt. *Richmond and Danville R. R. Co.*, 81 *North Car.*, 547). The attempt to impress upon Luke's acts a dual character, namely, that of the company's representative up to a certain point, and that of fellow-servant beyond, is fully answered by the criticism of CHURCH, Ch. J., upon a similar contention in the *Flike* case. "The acts of Rockefeller cannot be divided up and a part of them regarded as those of the company and the other part as those of a coservant, merely, for the obvious reason that all his acts constituted but a single duty. His acts are indivisible and the attempt to create a distinction in their character would involve a refinement in favor of corporate immunity not warranted by reason or authority." It may further be observed that Luke was not working with the drillers when the accident occurred. He gave the signal which caused the accident in his capacity as chief of his special department. In doing so, to quote again from the opinion in *Flike's* case, he occupied "the place of the corporation and the latter should be deemed present and, consequently, liable for the manner in which the act was performed." Luke's act in giving the signal was in fact the act of the corporation. There being no other point in the case of any importance the judgment should be affirmed, with costs.

BRADY and DANIELS, JJ., concur.

Wilcox agt. Harris.

MONROE COUNTY COURT.

SYLVESTER WILCOX agt. DAVID HARRIS.

Practice—Supplementary proceedings—Contempt.

When an order is issued by a judge having jurisdiction the person upon whom it is served has two paths to pursue, and only two, if he desires to avoid contempt of court. He must either obey it, or procure it to be set aside. Even if it be erroneous he has no right to disregard it.

Questions which arise in the presence of the referee and in the course of the proceeding, and which he has not authority to settle, may very properly be brought at once before the judge who granted the order; but questions arising away from the referee and touching the validity of the order itself are entirely different in their nature and do not belong to the proceeding before the referee, nor can they properly be raised there.

On an application to punish a party for contempt in disobeying an order, to her directed as a third party in supplementary proceedings, it is no excuse that she appeared and objected that no legal service of the order had been made upon her. The plaintiff having proof of service sufficient on its face the respondent will avoid the service only by the same application that would avoid the order itself. She has no right to meet that proof of service by a counter-affidavit before the referee, nor ask that she be examined there or before the judge who granted the order personally on that subject.

Before JOHN S. MORGAN, Special County Judge, July 26, 1880.

APPLICATION to punish Anna Maria Harris for contempt in disobeying an order, to her directed as a third party in supplementary proceedings.

It appears by the report of the referee that upon the return of the original order, to her directed, Mrs. Harris appeared with counsel and objected that no legal service of the order had been made upon her, as the signature of the judge who granted the order had not been shown or called to her attention at the time of service. To this fact she filed her affidavit

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with the referee. The plaintiff filed an affidavit of the person who made the service showing proper service. Her counsel also raised several objections to the sufficiency of the affidavit upon which the order was granted, among which were:

First. That the affidavit did not comply with Rule 25, in that it did not state whether a previous application had been made.

Second. That the execution alleged to have been issued was more than five years after the recovery of the judgment, and no leave of the court was shown to have been obtained therefor.

Third. That it did not show sufficiently or properly that the person who made the affidavit had the right or authority to make the same.

Having raised these objections her counsel offered to go at once before the judge who granted the order and settle the questions raised. The counsel for plaintiff refused so to do and demanded that the party be sworn and the examination proceed. This was refused under advice of counsel, and the party is now brought before me to show why she should not be punished for contempt in refusing to obey this order. Her counsel offers as her excuse the objection above specified.

W. F. Osborne, for plaintiff.

H. J. Sullivan, for Anna M. Harris.

MORGAN, J. — It seems to me hardly necessary to consider here whether the objections to the affidavit upon which this order was granted would or would not have been good if properly raised. When an order is issued by a judge having jurisdiction the person upon whom it is served has two paths to pursue, and only two, if he desires to avoid contempt of court. He must either obey it or procure it to be set aside. Even if it be erroneous he has no right to disregard it (*Arctic Insurance Company* agt. *Hicks*, 7 Abb. Pr., 204). There

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can be no doubt that the affidavit here was sufficient to give jurisdiction to the judge granting the order, even conceding that upon application or proper cause shown it would have been set aside; and the respondent having elected neither to obey it nor to have it set aside is as clearly in contempt. She had no more right to disobey the order in the presence of the referee than by refusing to appear before him at all. He certainly could not pass upon the questions raised, and she had no right to attempt to raise them before him, nor to ask that, having raised them before him, the plaintiff should go with her before the judge who granted the order and obtain a decision regarding them. Questions which arise in the presence of the referee and in the course of the proceeding and which he has not authority to settle may very properly be brought at once before the judge who granted the order; but questions arising away from the referee and touching the validity of the order itself are entirely different in their nature and do not belong to the proceeding before the referee, nor can they properly be raised there. If, therefore, the party desires to take his chances on the order being a nullity, he must also take his chance of committing contempt of court. The question as to the sufficiency of the service comes very largely within the rule above stated. The plaintiff having proof of service sufficient on its face the respondent will avoid that service only by the same application that would avoid the order itself. She had no right to meet that proof of service by a counter-affidavit before the referee, nor to ask that she be examined there or before me personally on that subject.

I am compelled, therefore, to hold that the respondent is guilty of contempt of court, but, inasmuch as the contempt seems to have arisen from a misconception of the proper practice in such cases rather than from intent, I am inclined to inflict only a very slight penalty and fine her ten dollars, costs of this application.

Let orders be prepared accordingly and directing the re-

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spondent to appear and be examined as prescribed by the statute (*section 296, old Code*) before the same referee at a time and place to be fixed.

N. Y. COMMON PLEAS.

In the Matter of the Assignment of JOHN H. HORSFALL.

Assignee — right of, to procure his discharge upon a composition deed, without an accounting — Order of discharge procured by an assignee ex parte, no proceedings for an accounting being instituted, is irregular and will be vacated.

The statute has provided for the mode in which an assignee in an assignment for the benefit of creditors under the statute, where there has been a composition between the assignor and his creditors, may be discharged, which is on a proceeding for an accounting under the act (*Laws of 1877, chap. 466, section 20*).

The only mode in which the court has power to discharge the assignee is upon proof of the composition in a proceeding for an accounting.

It is essential and indispensable that there should be an accounting in every case, and that it cannot be dispensed with unless there has been a clear, distinct and undoubted waiver of it by every creditor who could in any way be affected by the assignee's discharge.

General Term, February, 1879.

APPEAL by John W. Hesse, assignee, from an order vacating his order of discharge upon the application of John T. Camp, a creditor.

Louis C. Waehner, for appellant Hesse.

George C. Lay, for respondent Camp.

DALY, *Ch. J.* — The order vacating the order discharging the assignee should, in my opinion, be affirmed. The statute

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has provided for the mode in which an assignee in an assignment for the benefit of creditors under the statute, where there has been a composition between the assignor and his creditors, may be discharged, which is on a proceeding for an accounting under the act (*Laws of N. Y.*, 1877, *chap.* 466, *sec.* 20). It was undoubtedly, as the appellant claims, within the power of the creditors to waive the accounting, for a party may waive any provision of law or statutory or constitutional enactment designed for his benefit or protection.

But the creditors in this case have not by the composition deed waived an accounting. The assignor and the creditors, Briggs & Harris, who together brought about the composition, did so with the assignee, and the application of the assignor, Horsfall, and of Briggs, to vacate the order discharging the assignee was denied by judge VAN HOESEN, in the case of Briggs, upon the ground that he had, by the verbal agreement, waived his right to an accounting. But the petitioner, Camp, was no party to this verbal agreement and is in no way concluded by it. He is simply one of the creditors who signed the composition, and all that they agreed to was that an order might be made by any judge of this court discharging the assignee without notice to them.

The assignee was entitled, under this agreement, to apply to any judge of this court for his discharge without notice to the creditors who signed the composition deed; but the only mode in which the court had power to discharge him was upon proof of the composition in a proceeding for an accounting. When the creditors consent that an order may be made by any judge of the court discharging the assignee they necessarily mean discharging him without any notice to them in the manner prescribed by law, there being no other way in which a judge could discharge him.

To constitute a waiver the consent should have been without any accounting.

The *ex parte* order, therefore, discharging him was irregular and was properly vacated.

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It was provided by the composition deed that after the execution and delivery of it the assignee might, after paying all claims and demands against the assigned estate which, as assignee, he was liable to pay, and after deducting \$200 for his fees reassign to Horsfall, the assignor, the property, of whatever nature or description, which might be in his possession under the assignment.

This is very clear from the instrument — that he was to do this before he had the right to apply to a judge of the court to be released and discharged from his trust.

The composition creditors had agreed to release and discharge the assignor from all liability upon the payment by him of twenty-five per cent of the amount of their respective claims, and the reassignment of the assigned estate to him by the assignee as provided for in the instrument, was clearly necessary to enable the assignor to carry out the composition for it is to be assumed, as this was a general assignment of all the debtor's property for the benefit of creditors, that he had nothing to enable him to pay the compounding creditors until the property was restored to him by a reassignment; and this is sworn to have been the fact by the assignor and by Briggs, who was one of the principal creditors.

But the *ex parte* order discharging the assignee was made with the consent of the assignor before a reassignment of the property, and was for that reason alone irregular. This was not a provision which the assignor could waive, except so far as his rights were concerned.

The composition creditors had rights also. It was for their interest that the assignor should be enabled, as speedily as possible, to carry out the composition, as the payments were to be made in about a month after the execution of the composition deed; and the assignor could not, without their consent, agree so as to bind them that the assignee might be discharged before reassigning the property. The provision in the composition deed ratifying and confirming all the acts, transactions, payments and proceedings of the assignee means

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when he had complied with the conditions of the deed by reassigning the property, and is in a position to procure his discharge in the mode provided by the statute. From the facts disclosed, an accounting in this case was necessary, as the assignee, if he has done what is alleged, has impaired the estate and lessened the ability of the assignor to comply with the terms of the composition. The opinions delivered by judges VAN HOESEN and J. F. DALY, in the assignment cases of Cottlon, Yeager, Doyer, Lowenthal, and by judge VAN HOESEN in the application of Horsfall & Briggs, in the present case, show how essential and indispensable it is that there should be an accounting in every case, and that it cannot be dispensed with unless there has been a clear, distinct and undoubted waiver of it by every creditor who could in any way be affected by the assignee's discharge, which was not the case here.

I do not think that it affects the question whether the petitioner may have been tendered the amount of the composition or not if the discharge was irregular. He was not, as Briggs was, concluded by any agreement on his part to waive an accounting, and had the right to bring the matter before the court, it being the duty of the court to see that the rights of all the creditors are protected before discharging the assignee.

The order, therefore, should be affirmed.

J. F. DALY, J., concurs; VAN BRUNT, J., dissents.

People *ex rel.* Salke agt. Talcott.

SUPREME COURT.

THE PEOPLE *ex rel.* LEWIS SALKE agt. JAMES TALCOTT
and the MARINE COURT.

Stipulation on appeal — Writ of prohibition — Practice on appeals from order of general term, marine court, granting a new trial to court of common pleas.

There can be no appeal from an order of the marine court granting a new trial without the stipulation required by the act of 1874. Nor have the provisions of chapter 479 of the Laws of 1875 abrogated or repealed the provisions of the act of 1874.

The absence of the stipulation and the appeal from the order assuming the appeal was regular under the act of 1875, took the case out of the provisions of the act of 1874 and left the court of common pleas to the exercise of the discretion vested in that court in such cases by subdivision 2 of section 43 of chapter 479 of the Laws of 1875, and the exercise of that discretion is not reviewable at a special term of this court on the extraordinary writ of prohibition.

The relator if aggrieved by the judgment of the court of common pleas because of any irregularity of form, has a plain remedy by application to that tribunal for the correction of the judgment, this court should not interfere by prohibition while so simple and easy a remedy lies open to the relator.

As there was no lawful appeal which could give the court of common pleas jurisdiction under the statute, the case has remained in legal contemplation in the marine court, subject to the order of the general term granting a new trial, and this court will not interfere with the functions of that tribunal in this case by a writ of prohibition.

First Department, General Term, August, 1880.

THE appeal was from an order at special term granting a writ of prohibition forbidding the marine court from taking further proceedings in an action between the relator and the respondent, Talcott, to recover the value of goods sold and delivered, and which Salke obtained by false and fraudulent representations.

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The plaintiff secured a judgment for \$473.79, which the general term of the marine court reversed on appeal, and ordered a new trial. Talcott appealed to the court of common pleas, but did not accompany his notice of appeal with any stipulation that judgment absolute might be rendered against him in the event of an affirmance. The court of common pleas affirmed the order appealed from and remitted the case to the marine court for a new trial. The relator claimed that such disposition of the case was improper, that judgment absolute should have been rendered by the court of common pleas in his favor, notwithstanding that the record contained no stipulation to that effect.

Thomas & Wilder, for appellants.

Richard S. Newcomb, for respondents.

DAVIS, *P. J.* — For several reasons the writ of prohibition in this case was improperly granted :

1. The appeal from the order of the general term of the marine court granting a new trial was not accompanied by the stipulation required by chapter 545 of the Laws of 1874. In *Gordon agt. Erdman* the court of appeals have held that "there can be no appeal from an order of the marine court granting a new trial without the stipulation required by the act of 1874." The court also held that the provisions of chapter 479 of the Laws of 1875 had not abrogated or repealed the provisions of the act of 1874. That decision is, of course, controlling, and it follows that the court of common pleas, whatever else it might have done, had no power to render judgment absolute against the appellant from the order granting the new trial. The order of the common pleas in affirming the marine court did not render judgment absolute against the appellant ; and it appears from the opinion of the general term that it did not intend to do so. To hold in this case that in a case where it not only had no power to render such a judg-

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ment, and did not render it but declared emphatically its intention to the contrary, the law will regard what it did do as equivalent to such a judgment, would be a novel exercise of the authority of the court under the writ of prohibition. The legal effect of the judgment of the court of common pleas was to remand the case to the marine court for such action as is directed by the order of the general term.

2. The absence of the stipulation and the appeal from the order, assuming the appeal was regular under the act of 1875, took the case out of the provisions of the act of 1874 and left the court of common pleas to the exercise of the discretion vested in that court in such cases by subdivision 2 of section 43 of chapter 479 of the Laws of 1875. This was the view taken by the judges of the common pleas (for reasons specially assigned), and the exercise of that discretion is not reviewable at a special term of this court on the extraordinary writ of prohibition.

3. The relator, if aggrieved by the judgment of the court of common pleas because of any irregularity of form, has a plain remedy by application to that tribunal for the correction of the judgment. This court should not interfere by prohibition while so simple and easy a remedy lies open to the relator.

4. If there was no lawful appeal which could give the court of common pleas jurisdiction — as seems to be the view of the court of appeals — under the statute, the case has remained in legal contemplation in the marine court subject to the order of the general term granting the new trial. That court is, perhaps, to do nothing more than to proceed, in the discharge of its judicial duty, to a new trial in conformity with the judgment of the general term. There is, therefore, no more reason for interfering with the functions of that tribunal in this case by a writ of prohibition than there is to arrest all its functions by similar process. If the court is assuming to act without authority the relator can protect himself by raising the proper objections and by exceptions at the time the case

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is moved for trial, and by correcting the erroneous ruling, if any, by appeal. His rights depend upon questions of law, which may be presented and all errors affecting the same corrected, in the ordinary proceeding in the action, without resorting to a writ designed for purposes foreign to the review and correction of those errors which occur in the progress of the trial and decision of causes.

The order should be reversed and the writ quashed.

BRADY and BARRETT, JJ., concurred.

SUPREME COURT.

THE BENEDIOT & BURNHAM MANUFACTURING COMPANY agt.
DAVID G. THAYER.

THE PEOPLE *ex rel.* DAVID G. THAYER agt. PETER BOWE,
sheriff, &c.

Execution against the person — Effect of omission to return within sixty days.

An execution against defendant's person is not void because of the omission to direct its return within sixty days; and a return by the sheriff that the defendant was discharged under an order because of such defect fell with the reversal of the order on which it was based, and the validity of the execution was not impaired thereby.

First Department, General Term, July, 1880.

APPEAL in the action from an order denying plaintiff's motion to cancel the sheriff's return upon an execution against the person of the defendant, and to remit said execution to said sheriff.

Appeal in the special proceedings from an order made on *habeas corpus* discharging the defendant in the action from the custody of the sheriff.

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Cephas Brainerd and James S. Stearns, for appellants.

A. C. Brown, for respondent.

BARRETT, *J.* — When this case was previously before us we held that the execution against the defendant's person was not void merely because of the omission to direct its return within sixty days. We accordingly directed, what should have been done in the first instance, an immediate amendment to cure this trivial objection, reversed the order discharging the defendant and remanded him to the custody of the sheriff under the execution. It seems, however, that shortly after the argument before us, and while the matter was yet under advisement, the sheriff took upon himself, at whose instigation does not appear, to return the execution, specifying that the defendant had been discharged from custody under the very order, the validity of which was then under consideration. This fact was called to our attention when the order reversing the discharge and remanding the defendant was subsequently made, but we deemed it of no moment. Of course the return fell with the reversal of the order on which it was based. The validity of the execution had been in no wise impaired. It was not like the case of *Gleason and Roberts* (*MS. opinion court of appeals*) where, in consequence of the reversal of the judgment, the very foundation of the execution had fallen. The only reason why we did not at once cancel the return and remit the execution to the sheriff for proper action, in accordance with the facts as they then existed, was because we deemed that to be more properly the function of the special term. We are at a loss to understand, in the absence of any opinion from the court below, why this course was not pursued. It would be a reflection upon the administration of justice if this defendant were to escape the legal consequence of his acts by such unmeritorious technicalities as he has invoked upon both applications. It is clear that the force of the execution was but temporarily

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spent by the erroneous discharge and the sheriff's return to that effect. The effect of the reversal was plainly to restore the original and legal status. Practically this could only be done by canceling the return, replacing the execution in the sheriff's hands, and leaving that officer to resume his custody of the defendant and, thereupon, to make a new and proper return.

The order in the action should be reversed, with ten dollars costs and disbursements of the appeal, the return canceled and the execution remitted to the sheriff. The order in the *habeas corpus* proceedings should also be reversed, with ten dollars costs, and disbursements and the prisoner remanded to the custody of the sheriff.

N. Y. MARINE COURT.

MARY A. SMITH agt. ELIZABETH GRATZ *et al.*

Pleading — Complaint — Answer — Effect of general denial of the allegations of the complaint, except as afterwards admitted to be true.

Where the answer denies having any knowledge or information sufficient to form a belief as to any or all the allegations in the complaint contained and, therefore, denies the same, except as hereinafter specifically admitted, the facts which were specifically admitted having been demurred to, on motion for judgment on this general denial:

Held, that the denial in the answer is good. The form of pleading is one well known to the profession and has been sanctioned for years. *McEnroe agt. Decker*, 58 *How.*, 251, not followed; see *Allis agt. Leonard*, 46 *N. Y.*, 688.

Special Term, July, 1880.

MOTION for judgment on answer as frivolous.

HAWES, *J.* — The motion is for judgment on the answer as frivolous. The answer denies having any knowledge or

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information sufficient to form a belief as to any or all the allegations in the complaint contained and, therefore, denies the same, except as hereinafter specifically admitted. The facts which were specifically admitted having been demurred to the plaintiff moves for judgment on this general denial, relying upon the case of *McEnroe agt. Decker* (58 *How.*, 250). The form of pleading here used is one well known to the profession and has been sanctioned for years. That it is evasive must be admitted, and if the views expressed in *McEnroe agt. Decker* can possibly be sustained by precedent it should be done in furtherance of what I deem a substantial advance upon the form of pleading that has long prevailed, but which gives apparent opportunity for false and dilatory defenses. I am unable, however, to satisfy myself that such is the law as it stands at present. The authoritative cases relied on in *McEnroe agt. Decker* are *The People agt. Snyder* (reported in 41 *N. Y.*, 400) and *The People agt. Northern Railroad Co.* (42 *N. Y.*, 217). My attention has been called to a memorandum in the Albany Law Journal of July 10, 1880, in which the cases referred to in *McEnroe agt. Decker* are criticised, and the case of *Allis agt. Leonard* referred to. The case of *Allis agt. Leonard* (reported in 46 *N. Y.*, 688, and in full in *Albany Law Journal of July tenth*) is valuable only as being a late utterance of the court of appeals on that subject. It cannot be assumed that judge DANIELS, in the case of *People agt. Snyder*, intended, by mere dictum, to declare as frivolous a form of pleading that has been so long recognized in all the courts of the state since the adoption of the Code. It is true that he criticises and declares it peculiar, but in no sense did he pass upon it; and from the incidental manner in which he referred to it, it can scarcely be deemed a judicial expression of opinion. As a form of good or bad pleading it was in no sense discussed. The case of *The People agt. Northern Railroad Company* is very far from deciding this question in plaintiff's favor; and in so far as it is a decision it may be said to be in support of

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defendant's view and could well have been cited by him. The allegation in *The People agt. Northern Railroad Company* was a general denial upon information, and denial except as to matters specifically admitted, and was similar to *McEnroe agt. Decker* and the case at bar. The court says: "Assuming that a denial by the defendants in their answer of each and every allegation and averment in the complaint in this action contained, not therein before specifically admitted, is sufficient to controvert the matters, if any, not so admitted and put them in issue, it appears by an examination of its contents that no material fact is denied." He then proceeds to analyze the admissions and finds that they are so complete and absolute that no issue is created. This is all that is determined in the case so far as I can comprehend. These two cases are the only authoritative cases that can be possibly cited as supporting the view expressed in *McEnroe agt. Decker*, and it is submitted that, as an authority upon the points at issue, they must be deemed of a very doubtful character. The case of *Allis agt. Leonard*, however, is in point and cannot be construed otherwise than as a direct ruling upon it. The case of *The People agt. Snyder* was decided in December, 1869, and *Allis agt. Leonard* in November, 1871. In *Allis agt. Leonard* the action was upon a promissory note held by the transferee against the maker, and the answer denied "each and every allegation of the complaint except those admitted." The admission was the "making and delivery of the note." The court declares that "as the question seems to have been disposed of wholly on the question of pleading it is necessary to examine the complaint and answer," and in that connection says: "It (the answer) denies each and every allegation except that expressly admitted. We think that this was a sufficient denial of the transfer of the note. The defense was meritorious, if true, and the pleading should have been liberally construed for the purpose of admitting it. But a strict construction would lead to the same result." There can be no question of the intent of

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the court of appeals in this case to pass upon the point in issue, and to pass upon it decisively. While I could wish another construction I am compelled to yield to what, in my opinion, must be deemed the controlling decision upon this question, and which fully establishes the validity of this form of pleading.

Motion for judgment on the answer as frivolous denied, but without costs.

SUPREME COURT.

THE PEOPLE *ex rel.* JAMES O'REILLY agt. THE MAYOR, &C., OF THE CITY OF NEW YORK, ALLAN CAMPBELL, commissioner of public works, and JOSEPH BLUMENTHAL, superintendent of incumbrances.

New York (city of) — Unlawful obstruction of the streets — Duty of commissioner of public works and the superintendent of incumbrances — mandamus the proper remedy to compel them to perform their duty.

The common council of the city of New York have no power or right to authorize the placing or continuing of any obstruction upon any street or sidewalk, except the temporary occupation thereof during the erection or repair of a building on a lot opposite the same.

The common council by resolution declared that licensed vendors should be permitted to occupy Forty-second street, west of Eighth avenue and within 325 feet of that avenue, Saturday nights from 6 to 12 o'clock:

Held, that to permit the street to be occupied and obstructed in this manner is clearly unlawful. It not only prevented its use and enjoyment for the ordinary purposes for which it is maintained, but also deprived the owners and residents upon it of the complete and beneficial use and enjoyment of their own property; and as to them the obstruction was substantially a nuisance, and a party suffering special injury from it has a right to appeal to the courts for redress.

Held, further, that where the superintendent of incumbrances and the commissioner of public works (who in terms are authorized to keep the streets clear of obstructions) have been applied to and requested to exercise their authority and remove these obstructions but have declined and refused so to do, a *mandamus* will issue requiring them to interpose and remove the same.

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Although, as a general rule, a *mandamus* will not issue where the party has another remedy, it is not universally true in relation to corporations and ministerial officers, for while they may be liable in an action for neglect of duty they may still be compelled by this writ to exercise their functions according to law.

At Chambers, May, 1880.

Thomas Cushing and James Clark, for relator.

William C. Whitney, for defendants.

DANIELS, *J.*—The application in this case is for a writ of peremptory *mandamus* requiring the removal of obstructions in Forty-second street, between Eighth and Ninth avenues.

The applicant is a physician having his residence and office at 303 West Forty-second street, which is about seventy-five feet west of the Eighth avenue; and since the 6th of June, 1879, vendors of various articles have occupied this portion of Forty-second street from 6 o'clock until 12 in the evening, with horses, wagons, merchandise, and assistants, for the purpose of selling their property. It appears by the affidavit of the applicant that the street, at this point, has been occupied by about fifty of these vehicles, selling various descriptions of produce—meat, fish and other goods—to persons resorting to that locality for the purpose of making their purchases. The vehicles, together with the patrons, appropriate so much of each side of the street and sidewalks as to prevent their free use and enjoyment by persons having occasion to pass along them. The vehicles are backed up to the walks and the articles exposed for sale in them, and purchased by persons standing upon the walks. The obstruction occasioned in this manner is shown to have been so great as seriously to impair and interfere with the enjoyment of the applicant's property. He is unable to approach or leave it with his own vehicle, and prevented by the noise and disturbance of the street from properly practicing his profession;

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and his patients appear to be incommoded in passing to and from his residence. The injury to him is both personal and substantial, and one which he has a right to have redressed through the instrumentality of the courts, if this occupancy of the streets and walks shall be found to be unlawful. The primary object of streets and walks is the accommodation of persons having occasion to use them, and they are entitled to this enjoyment free from needless obstructions; and if this street has been occupied in this manner without lawful authority, such occupancy is substantially a nuisance requiring to be terminated by the interposition of the courts. It is claimed on the part of the officers proceeded against, on whom alone the papers were served, that the persons using the street in this manner had been authorized to do so by the license of the common council of the city, and that this license was a legal exercise of existing authority. The license was provided for by a resolution adopted by the board of aldermen upon the report of the committee on streets on the 6th of June, 1879, and it declared that licensed vendors should be permitted to occupy Forty-second street, west of Eighth avenue, and within 325 feet of that avenue, Saturday nights from 6 to 12 o'clock, but not to interfere with public travel on the streets. The effect of the resolution, as well as its terms, was to permit an occupancy of this street during the hours mentioned upon every recurring Saturday night. It was not simply to pass along the street or to use it as streets ordinarily are used for the convenience of the public in supplying the wants of those who reside upon them, but it was, for the time mentioned, an exclusive appropriation of so much of the street as should be found necessary for the occupancy mentioned in the resolution. The charter of the city then in force authorized the common council to regulate traffic and sales in the streets, highways, roads and public places of the city, but it evidently was not intended that such authority should be exercised in the manner in which it has been by means of this resolution; for a succeeding subdivision of the same section in which this pro-

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vision is contained declared that the council should have no power to authorize the placing or continuing of any obstruction upon any street or sidewalk, except the temporary occupation thereof during the erection or repair of a building on a lot opposite the same (*Laws of 1873, 487-8, 17, subd. 1-4*). These two provisions require, as they relate to the same subject, to be construed together, and the latter so far restrains and limits the former as to withhold, by means of its terms, such power as was attempted to be exercised through this resolution. Under the latter subdivision no obstruction of any street or sidewalk of the description of that permitted by the resolution can be authorized by the common council; and such was the view which was taken of these provisions by Mr. justice VAN VORST in the case of *Ely agt. Campbell* (*MS. opinion, post.*)

To permit the street to be occupied and obstructed in this manner was clearly unlawful. It not only prevented its use and enjoyment for the ordinary purposes for which it is maintained but also deprived the owners and residents upon it of the complete and beneficial use and enjoyment of their own property; as to them the obstruction was substantially a nuisance, and a party suffering special injury from it has a right to appeal to the courts for redress.

That might probably have been secured by means of an indictment, or, to a certain extent, by an action for damages; but these remedies were somewhat doubtful in their nature and would not afford that immediate assistance which the residents upon the street had the right to require. For that reason the application for the writ of *mandamus* has been made requiring the officers of the city having supervision of the streets to interpose and remove these obstructions. These officers have been requested to exercise their authority to secure this result, but they have declined to do so for the reason that it was supposed that the resolution of the common council legally permitted this use to be made of the streets.

One of the officers to whom this application was made was

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the commissioner of public works, who in terms was authorized to keep the streets clear of obstructions (*Laws of 1873*, 502, *sec. 71, sub. 9*). And for the purpose of more effectually accomplishing that end it has been provided, further, that there should be a bureau in his department for the removal of incumbrances of the streets and sidewalks, the chief officer of which should be called the superintendent of incumbrances, to whom all complaint should be made, and by whom such incumbrances should be removed (*Id.*, 503, *sec. 72, sub. 8*).

These two provisions confirm the construction already given to those contained in the preceding section, for they were enacted in such terms as to indicate the unlawful character of obstructions of this nature, and they render their removal by the commissioner of public works and the superintendent of incumbrances a positive and unqualified duty. They have the authority, and, in addition to that, are required to use it by removing incumbrances; and as these obstructions in this street have been maintained and continued without lawful authority it was their duty to remove them, notwithstanding the existence of the resolution adopted by the common council, for that resolution was in conflict with the provisions of the charter upon this subject and consequently invalid. Where ministerial officers like these are charged with the performance of a duty which any citizen is interested in having performed, and has a right to insist on its being performed, the officer may be required to act by means of the writ of *mandamus*. In this case the officers have no discretion, but the statute is plain and mandatory, and it is their duty, under its provisions, to remove these obstructions existing in the street, and the writ of *mandamus* is an appropriate means through which they may be required to exercise their authority and perform this duty (2 *Crary Sp. Proceedings* [2d edition], 556).

This writ may be allowed whenever a party has a legal right and is entitled to a specific remedy to enforce it, and a

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public officer whose duty it is to afford that remedy refuses to act (*Wood on Mandamus*, 27; *People agt. Asten*, 49 *Howard*, 406), if no particular remedy be given and there is no other plain and effectual mode of relief. *Mandamus* is proper in all cases where it is adopted to enforce the right and duty in question, and it will not be refused merely because there is a remedy in equity or an imperfect remedy at law, not adequate to the purpose, as an action for damages which would not remove the obstructions would be, or because the officers or adverse party may be prosecuted criminally for neglect of duty (*Dillon on Mun. Corporations* [2d edition], sec. 616; *People agt. Commissioners of Emigration*, 22 *Howard*, 291; *People agt. Collins*, 19 *Wend.*, 56). The principle now established will entitle the party to this writ whenever a legal right exists and his legal remedy either fails or is inadequate; and the fact that the party may be indicted does not constitute any proper objection to the issuing of the writ (*People agt. Mayor, &c.*, 10 *Wend.*, 395).

Although, as a general rule, a *mandamus* will not issue where the party has another remedy, it is not universally true in relation to corporations and ministerial officers, for while they may be liable in an action for neglect of duty, they may still be compelled by this writ to exercise their functions according to law (*McCullough agt. The Mayor*, 23 *Wend.*, 458). Under the principle maintained by these authorities this applicant appears to have just legal grounds to support him in this application. The obstruction is unlawful; it has been specially injurious to him as an occupant of property, and no legal authority for its creation or continuance exists. It has been made the duty of the officers proceeded against to remove it, and in that manner to restore the street to the state of usefulness and convenience it was designed to afford.

They have refused to perform that duty, and as the applicant has a right to insist on its performance he is entitled to this writ for the purpose of setting these officers in motion, and securing that degree of redress in the premises which he

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is legally entitled to receive. An order will, therefore, be entered directing the writ to issue to the superintendent of incumbrances and the commissioner of public works requiring them to remove the obstructions from this street, which has been created and is continued by the persons who have resorted there, under the liberty secured by the terms of this resolution, for the purpose of selling their wares and products, but, under the circumstances, no costs of the application will be allowed.

SUPREME COURT.

JOHN DERRENBACKER agt. THE LEHIGH VALLEY RAILROAD
COMPANY.

Appearance — Answer — Corporation — Effects of a general appearance and answer of a defendant corporation — Negligence — Contributory negligence question for jury.

The general appearance and answer of a defendant corporation ought to be deemed an admission of its corporate existence ; and it ought not afterwards, when no special issue is presented, insist that plaintiff must produce and prove its character ; at all events, in such case it is enough to show user or corporate acts to make a *prima facie* case of the entity and identity of such corporation.

The plaintiff, a canal boatman, in helping to discharge iron ore from a boat at Perth Amboy, pushed the iron tub which was being hoisted by a derrick as was customary and thus went partly under the tub, which fell upon him, causing the injury sued for:

Held, that the question of contributory negligence of plaintiff's act was properly submitted to the jury, such act not being *per se* evidence of negligence.

Held, also, that some slight evidence having been given that defendant was the owner of the derrick and of the rope used, and the use of the derrick being much for the benefit of defendant and as the iron ore was being transferred by its consignees to defendant's cars in the usual way, and as it should not be presumed that the consignees were trespassing in making use of the derrick, in the absence of all explanation on defendant's part, the jury were justified in finding that the consignees

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were using the derrick in the usual way, with defendant's knowledge and consent, and for its and their mutual benefit.

Held, further, that, defendant was, therefore, liable if the rope was unsafe and unfit for the work, and there being some evidence to go to the jury on these questions, the court properly submitted the questions to them, some force being properly given to the omission of defendant to give explanatory evidence.

First Department, General Term, July, 1880.

APPEAL from judgment entered on verdict of jury and from order denying motion for new trial on the minutes.

Charles B. Alexander, for appellant.

Edward H. Hobbes, for respondent.

DAVIS, *P. J.*—The motion to dismiss the complaint on the ground that plaintiff has not proved the corporate character of defendant was properly denied. When a corporation brings suit it is bound to allege its corporate existence, and at common law was bound to prove it under the general issue. The rule is the same now as to foreign corporations, but as to domestic corporations the rule is so far changed by statute that such a plaintiff is only put to show its own corporate existence when the defendant pleads specially "*nul tiel* corporation." But where a corporation is sued its general appearance and answer in the action ought to be deemed an admission of its corporate existence as such, as much as the general appearance and answer of a natural person is an admission of his existence and identity. It appears and answers as a corporation when no special issue is presented on that question, and thus puts itself into court as such, and ought not afterwards to be heard to insist that plaintiff must affirmatively prove that it is what it has put itself on record as being. Some confusion has arisen on this subject (perhaps in the cases) by not perfectly observing the difference between a plaintiff corporation's own affirmation of its exist-

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ence, when put in issue by an answer, and the appearance of a corporation, when sued as defendant, on putting in an answer in the name by which it is sued. At all events, in such a case, it is enough to show user or corporate acts to make a *prima facie* case of the entity and identity of the artificial person that has appeared and is defending the suit. In this case the issues were tried all through the plaintiff's case upon the assumption that the Lehigh Valley Railroad Company was an existing corporation. It was quite right, therefore, not to permit the defendant to railroad itself out of court because its charter was not produced and proven. The *prima facie* case was sufficient to call upon the defendant to give some of the evidence which the learned counsel says his client was misled into not producing, to wit, "negative proof of its non-existence," if any such it had.

The question whether the plaintiff's own negligence contributed to his injury was properly submitted to the jury. It cannot be said, as matter of law, that the act of pushing the iron tub when it stopped, as described in the evidence, was *per se* evidence of negligence. It was an act which the plaintiff, or some other person, was accustomed to perform whenever a similar delay occurred, and there was no evidence to show that the plaintiff knew, or had reason to believe, that there was any greater danger than usual on the occasion. The rope happened to break while he was doing an act customary under similar circumstances. The evidence does not tend to show that his act broke the rope, but merely that it brought himself into a position to receive the injury. The charge upon the question was correct in law, and we are satisfied with the finding of the jury upon it.

The principal and difficult question in the case is whether sufficient was shown to justify the court in submitting to the jury the question of the liability of the defendant. Some evidence was given tending to show that the defendant was the owner of the derrick, and the rope used, the breaking of which caused the injury, was purchased for, and belonged to,

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the defendant. From the slight evidence produced by plaintiff it might well be inferred that the derrick was one belonging to the defendant and used generally on the dock for the purpose of transferring property from boats to the defendant's cars and from such cars to the boats, the object of defendant being to furnish facilities for making such transfers with ease and promptitude. Of course this was much for the benefit of defendant, as it avoided delay and detention of its cars, and expedited its business transactions. The consignees of the cargo of iron ore appear to have been using the derrick on the occasion of the injury; but as they were transferring the ore in the usual way from plaintiff's boat to defendant's cars, and as it should not be presumed that the consignees were trespassers in making use of the derrick, in the absence of all explanation on the part of the defendant, the jury were justified in finding that the consignees were using the derrick in the usual way with the knowledge and consent of the defendant, and for its and their mutual benefit. Under such circumstances, the liability of the defendant would depend upon the question whether it had furnished a rope suitable for the purpose and capable of sustaining the weight to be put upon it in doing the usual work for which it was to be used, or, having done so, it was continued in use after it had become so worn and weakened by strains and observable injuries as to be unsafe and unfit for the work.

There was some evidence to go to the jury upon both of these questions. There was slight evidence to show that the rope was not large enough when purchased to bear the weight of the quantity of iron ore usually taken in the tub. This evidence is not satisfactory to our minds; but when taken in connection with the proof as to the condition of the rope when it broke, and with the fact that it had broken the day before in unloading another cargo, and was then stranded or repaired and put into use for unloading plaintiff's boat when it broke again, with the serious consequences to plaintiff, under circumstances tending to show that due precaution was

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not used in repairing or in allowing it to be used, we are not able to see that the court erred in submitting the question to the jury. Some force is certainly to be given to the omission of defendant to give explanatory evidence to rebut the inferences from the evidence given by plaintiff.

It is easy to see that if the derrick and rope were not the property of defendant, or if they were not in use by its knowledge or consent, or if the derrick was not a facility provided by defendant for the benefit of its business, furnished to be used as above suggested, proof must have been in defendant's power to rebut the evidence given by plaintiff and the inferences a jury could draw therefrom.

We see no error in the charge as given by the court, or in his refusals to charge, and our conclusion is that the judgment must be affirmed.

BARRETT, J., concurs.

SUPREME COURT.

THE PEOPLE *ex rel.* ROBERT J. ROSENTHAL agt. SAMUEL N.
COWLES.

Habeas corpus — To whom application for the writ must be made — Form of petition.

The restriction in the *habeas corpus* act that application for a writ must be to a judge or officer within the county where the prisoner is detained, or an adjoining county, does not apply to the supreme court or one of its justices.

The plain reading of the statute is that an application may be made to the supreme court, or to one of its justices anywhere, but when it is made "to any officer who may be authorized to perform the duties of a justice of the supreme court at chambers," that officer must be or reside "within the county where the prisoner is detained," unless there "be no such officer within such county, or if he be absent, or for any cause be incapable of acting, or have refused to grant such writ."

Where the petition fails to state the locality of the confinement it is

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defective. The locality of the detention should be stated so that the discretion of the court or judge, as to the place of the return of the writ, could be exercised.

The petition is required to state "that such prisoner is not committed or detained by virtue of any process, judgment, decree or judgment specified in the preceding twenty-second section." A detention for one of the causes specified in said section should be negatived. The petition should show the party detained to be without the exception.

Special Term, August, 1880.

MOTION to punish the respondent for contempt in not producing the body of James Smith pursuant to the command of a writ of *habeas corpus*.

A. H. Purdy, for the motion.

L. L. Delafield, opposed.

WESTBROOK, *J.* — Upon the application of Robert J. Rosenthal, who claims to be the guardian of James Smith, an infant child whose parents are both dead, a writ of *habeas corpus* was allowed by a justice of this court, in the city of New York, sitting in a special term, then and there held by him, requiring Samuel N. Cowles, then residing in the city of Syracuse, in the county of Onondaga, to produce before the judge allowing the writ in said special term in the said city of New York the body of said James Smith in order that his alleged illegal detention might be inquired into.

The writ was duly served upon Cowles at the city of Syracuse, and on the return day thereof he did not produce the child but appeared by counsel and asked that the writ should be quashed for reasons which will be examined in the order in which they were made.

First. It is claimed that a justice of the supreme court has no power to require the body of a person detained in a county other than that in which the writ issues and in which it is made returnable, to be brought before him, unless there be no

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officer within the county where the person is so detained who has power to issue such writ, or unless "he be absent or have refused to grant such writ."

The objection is founded upon the provisions of the *habeas corpus* act, which will be found in 3d Revised Statutes (6th edition, pages 875, 876, &c.).

There is no such limitation upon the power of the supreme court, or one of its justices as is contended for by the counsel for the respondent. Section 37 (*section 23 of the old statute*) provides for an application: "1. To the supreme court during its sitting; or, 2. During any term or vacation of the supreme court to any one of the justices of the supreme court, or any officer who may be authorized to perform the duties of a justice of the supreme court at chambers, being or residing within the county where the prisoner is detained; or if there be no such officer within such county, or if he absent, or for any cause be incapable of acting or have refused to grant such writ, then to some officer having such authority residing in any adjoining county."

This section designates three tribunals to which the application for the writ can be made: 1st, "The supreme court during its sittings;" 2d, "Any one of the justices of the supreme court," and, 3d, "Any officer who may be authorized to perform the duties of a justice of the supreme court at chambers, being or residing within the county where the prisoner is detained."

If the nomenclature of the statute in defining the jurisdictions from which the writ issues is borne in mind there is no difficulty in its construction. A justice of the supreme court is an officer, but he is not one of those whom the section includes under that general term, for he is specially designated by his peculiar title, and those who are embraced by the words "any officer" are also so specifically defined that we know that a justice of the supreme court is not referred to, but only those "who may be authorized to perform the duties of a justice of the supreme court at chambers." The plain read-

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ing of this section is that an application may be made to the supreme court, or to one of its justices anywhere, but when it is made "to any officer who may be authorized to perform the duties of a justice of the supreme court at chambers," that officer must be or reside "within the county where the prisoner is detained," unless there "be no such officer within such county, or if he be absent or for any cause be incapable of acting or have refused to grant such writ."

The next section (*the 38th of 3 R. S. [6th ed.], p. 875, 876, and the 24th of the old statute*) evidently uses the word "officer" in the same sense that the preceding one does. It is not the supreme court or a justice thereof who is required thereby to deny the application for the writ when it is made out of the county "where the prisoner shall be detained," unless it be shown "that there is no officer in such county authorized to grant the writ, or, if there be one, that he is absent or has refused to grant such writ or for some cause to be specially set forth is incapable of acting," but "any officer not residing within the county where the prisoner is detained," using the word "officer" in the same restricted sense in which it is used in the preceding section.

This construction is made clear by section 43, 3 Revised Statutes (*6th edition*), pages 876, 877; chapter 240 of Laws of 1837, section 1, which provides: "When application shall be made to the supreme court, or to any one of the justices of the supreme court, for a writ of *habeas corpus* or *certiorari*, pursuant to the second article of title 1, chapter 9 of the third part of the Revised Statutes, in cases where the prisoner is confined in a county other than where such court shall then be held or officer reside, such court may, in its discretion, and such officer may, in his discretion, make such writ returnable before some other officer authorized to issue such writ in the county where the prisoner may be confined."

This section recognizes the power of the supreme court, or one of its justices, to issue the writ when the party detained is out of the county in which the application is made, and

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allows, either in its or his discretion, to make it returnable in the county where the detained is, before an officer who is there and who is authorized to issue it. It would certainly, at times, be a great hardship if relief could only be procured in the county where the prisoner was detained, either by *habeas corpus* or *certiorari*, for if there be a prohibition it applies to both; and the statute is not so unjust, for the limitation very clearly applies neither to the supreme court nor one of its justices, who have all the powers of the late court of chancery and the chancellor, but only to "any officer who may be authorized to perform the duties of a justice of the supreme court, at chambers."

The view now taken of the *habeas corpus* act is not novel but was adopted as long ago as 1847 by the late judge IRA HARRIS (*People ex rel. Benthley agt. Hanna*, 3 How., 39), and has been, I believe, generally adopted by the profession as sound. A simple reference to that case would have been sufficient if it had not been said on the argument that a brother judge had recently taken a different view of the law. With this intimation I have deemed it wise to review the statutes, and the result fully justifies the conclusion of the late learned judge reported as above stated. Indeed, there is not even plausibility in the objection when the application is to the supreme court while in session. The entire argument in its support is based upon the use of the word "officer" in the statute; and that word, as there used, has been shown, from the language of the act, was not intended to embrace a justice of the supreme court, and by no possibility can that word include the court. It is an officer as such and not a court whose jurisdiction is sought to be impaired; and as this particular writ was allowed in open court and made returnable there it is not in the least obnoxious to the objection which was urged. The point we have considered must, therefore, be overruled.

Second. Objections are also taken to the form of the petition, and some of them are fatal.

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1st: The thirty-ninth section of the act (3 *R. S.* [6th ed.], page 876, *subdivision* 1) requires the petition to state "the officer or person by whom he is so confined or restrained, and the place where."

The petition fails to state the locality of the confinement and is defective in that particular. Though the court or judge which issued the writ had the power to make it returnable where it was so made, the fact of the detention at Syracuse should have been stated so that the discretion of the court or judge, as to the place of the return of the writ, could have been exercised.

2d. The second subdivision of the same section (*the 39th of the 6th edition of R. S., and 25th of old edition*) requires the petition to state "that such prisoner is not committed or detained by virtue of any process, judgment, decree or judgment specified in the preceding twenty-second section."

The twenty-second, which exempts certain persons from the benefit of the *habeas corpus* act, is too well known to be quoted. The petition does not show James Smith to be without the exception. It is true that a cause of detention is specified, but a detention for one of the causes specified in such twenty-second section is not negatived, and that should be affirmatively done as the provision just quoted plainly requires.

For the two reasons just stated the writ of *habeas corpus* should be quashed and the motion to punish for contempt denied. No costs, however, will be allowed as the writ was not obeyed by the production of the body of Smith.

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NEW YORK COURT OF APPEALS.

THE PHENIX INSURANCE COMPANY, plaintiff and respondent,
agt. SIMEON E. CHURCH, defendant and appellant.

Promissory note — Bona fide holder — What constitutes an indorsee of negotiable paper a holder for value so as to exclude the equities of antecedent parties.

To constitute an indorsee of negotiable paper a holder for value so as to exclude the equities of antecedent parties he must have relinquished some right, incurred some responsibility or parted with value upon the credit of the paper at the time of the transfer.

If the indorsee, at the time of receiving a diverted note, surrenders a past-due check held by him and made by the person delivering such diverted note he becomes a *bona fide* holder for value and is entitled to recover, and this whether the surrendered note be not due or overdue.

The rule, however, is technical and is not to be extended to a bank check surrendered under similar circumstances.

The distinction consists in this, that the note is given as the representative of the debt while the check is not. Nor is it even a security for it; it is taken in place of money. Its delivery amounts to a representation by the drawer that there are funds in the bank upon which it is drawn sufficient to meet it, and if the representation proves untrue the check is a false token and does not, in any sense, pay or discharge the debt.

The courts of this state will not take judicial notice that the law of another state differs from our own.

The various cases reviewed (*See same case, reported vol. 56, pp. 29, 493*).

Decided May 31, 1880.

BROWN, PAPE & Co., who were insurance brokers in Boston, collected premiums of insurance for the plaintiffs, and being pressed for payment by one Founce, their general agent at Boston, gave him their check for the amount due. Payment of the check was upon presentation at the bank refused. Being urged by Founce for payment of the check Brown, Pape & Co., the drawers thereof, gave the note in suit to him for the plaintiffs, representing at the time that it was a good

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note; Founce, as the plaintiff's agent, thereupon surrendered to them their dishonored bank check.

It subsequently transpired that the note in suit had been given to one Worcester for a particular purpose, and that Worcester had diverted it by loaning it to Brown, Pape & Co.

The right of the plaintiffs to recover depended, therefore, upon the question whether under the circumstances they became *bona fide* holders of the note in suit so as to shut out, as against the maker, the equitable defense that the note had been diverted. The New York marine court, at trial term, held that the plaintiffs were *bona fide* holders of the note and awarded them judgment for \$593 and costs. The general term of that court, upon appeal, reversed the judgment. Upon a further appeal the New York common pleas affirmed the general term of the marine court (*see* 56 *How. Pr.*, 29), and upon a reargument subsequently ordered, decided the other way (*Id.*, p. 493).

The defendant thereupon appealed to the court of appeals.

S. E. Church, for appellant.

G. Tillotson, for respondent.

ANDREWS, *J.*— The fact that Founce took the note in question in nominal payment of the debt of Brown, Pape & Co. did not constitute him a holder for value, so as to shut out the defense that the note had been wrongfully diverted by the payee from the purpose for which it was made. It is the settled law of this state that prior equities of antecedent parties to negotiable paper transferred in fraud of their rights, will prevail against an endorsee who has received it merely in nominal payment of a precedent debt, there being no evidence of an intention to receive the paper in absolute discharge and satisfaction beyond what may be inferred from the ordinary transaction of accepting or receipting it in payment or crediting it on account. The law regards the payment

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under such circumstances as conditional only, and the right of the creditor to proceed upon the original indebtedness, after the maturity of the paper, is unimpaired (*Rosa* agt. *Brotherton*, 10 *Wend.*, 85; *Payne* agt. *Cutler*, 13 *id.*, 605; *Stalker* agt. *McDonald*, 6 *Hill*, 93; *Lawrence* agt. *Clark*, 36 *N. Y.*, 128; *Weaver* agt. *Barden*, 49 *id.*, 286; *Moore* agt. *Ryder*, 65 *N. Y.*, 438; *Potts* agt. *Myers*, 74 *id.*, 594). If, therefore, the claim that Founce, or the insurance company, his assignee, which has succeeded to his rights merely, can recover upon the note, in this action, notwithstanding the defense which it is conceded existed to the note in the hands of the prior holders and indorsees, rests solely upon the fact that it was received by Founce in payment of the debt of Brown, Pape & Co. it is clear from the authorities cited that it cannot be sustained. But the plaintiff relies upon another circumstance to sustain the position that it is a holder for value. The original indebtedness of Brown, Pape & Co. to Founce was for premiums on insurance collected by the firm and for which the firm was accountable to him.

In January, 1875, Brown, Pape & Co. gave to Founce their check on a bank, in ordinary form, in settlement of the balance then due to him. The check, on presentation, was dishonored for want of funds of the drawer to meet it, and it was presented to the bank for payment on several subsequent occasions but was not paid, and it is found that the firm neither at the time the check was drawn or at any subsequent time had funds in bank out of which the check could have been paid, and the court, upon this evidence, further found that the check was worthless. Founce held the check until March, when Brown, Pape & Co., who in the meantime had received the note in question from the payee, indorsed it over to Founce in part payment of the debt of the firm and he, at the time of the transfer, delivered to Brown, Pape & Co. their unpaid check.

It is claimed that the delivering up of the check upon receiving the note constituted Founce a holder for value of the note,

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discharged of the equities of the maker. Since the case of *Coddington* agt. *Bay* (20 *J. R.*, 637) it has been the established rule of the law in this state that to constitute an indorsee of negotiable paper a holder for value so as to exclude the equities of antecedent parties it is not sufficient that the transfer should be valid as between the indorser and indorsee, but, in addition, the latter must have relinquished some right, incurred some responsibility or parted with value upon the credit of the paper at the time of the transfer. In exact accordance with this principle and upon grounds which are entirely obvious and satisfactory, it has been frequently held that when a creditor takes from his debtor the note of a third person, before maturity, in good faith in payment of, or as collateral security for, the debt, and in consideration thereof gives up collateral securities held therefor, he thereby, to the extent of the collaterals surrendered, becomes a holder for value of the paper and takes it free from the defenses of antecedent parties (*Bank of Salina* agt. *Babcock*, 21 *Wend.*, 499; *Essex Co. Bank* agt. *Russell*, 29 *N. Y.*, 678; *Park Bank* agt. *Watson*, 42 *id.*, 490; *Chrysler* agt. *Revois*, 43 *id.*, 209). The question whether the surrender by a creditor to a debtor of the debtor's own note on taking the negotiable note of a third person is a parting with value within the rule in *Coddington* agt. *Bay*, and the subsequent cases first arose in this court in *Youngs & ano.* agt. *Lee* (12 *N. Y.*, 551) where the plaintiffs surrendered to their debtors, on receiving their note indorsed by the defendant, a prior note of the debtors given for merchandise sold by the plaintiffs. It was held that the surrender of the prior note constituted the plaintiffs holders for value of the note in suit to the amount of the note surrendered, and entitled them to recover against the indorser notwithstanding the delivery of the note to them was a diversion of it by the maker from the purpose for which it had been indorsed, the plaintiffs having received it, without notice of the diversion; the note surrendered was not due, and this fact is adverted to in the opinion of the court, but that circumstance was not the

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ground upon which the decision proceeded, as we shall hereafter show. In *Day* agt. *Saunders* (1 *Abbott's Court of Appeals Decs.*, 495) the plaintiff, on receiving the debtor's note indorsed by the defendant, which was a diversion from the purpose for which it was indorsed, surrendered four notes of the debtors, two of which were due and two not due, and the court held that the plaintiff was a holder for value and said that there was no distinction in principle between the case of a surrender of notes not due and of notes due, and they reversed the judgment of the court below founded upon this distinction, holding that the plaintiff was a holder for value of the note in suit, to the full amount of the notes surrendered. The question again arose in *Brown* agt. *Leavitt* (31 *N. Y.*, 113), which was an action against the maker of a promissory note, payable to the order of Zebley & Co., and indorsed by them to the plaintiff's testator in part payment of their note held by him which he surrendered on receiving the note upon which the suit was brought, and other notes and a balance in money. The defense alleged was fraud on the part of Zebley & Co. in obtaining the note, but it was not claimed that the indorsee had notice of the fraud when he received it. The evidence to show the alleged fraud was excluded on the trial and the plaintiff recovered. This court affirmed the judgment, DAVIS, J., saying: "In this state it is settled by abundant authority that this transaction constituted the plaintiff's testator a holder for value of the note in question. A further discussion of the question might lead to a suspicion that the law was in doubt on this point." In *Pratt* agt. *Coman* (37 *N. Y.*, 440) the court again held that the surrender to a party of his own negotiable note past due, and taking in lieu thereof the negotiable note of a third person, indorsed by the debtor, was a sufficient parting with value to constitute the indorsee a holder for value of the latter note. The counsel for the defendant, as appears from his printed points, sought to distinguish the case from *Brown* agt. *Leavitt*, on the ground that in that case it did not appear that the plain-

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tiff on surrendering the note had any remedy on the original indebtedness for which it was given, while in *Pratt* agt. *Coman* the note surrendered was given for money loaned by the plaintiff to Agnew, and that although the plaintiff had surrendered the notes he could still recover on the original consideration. The proposition that Pratt's right of action to recover the money loaned was not taken away by the surrender of the notes is supported by authority (*Hill* agt. *Beebe*, 13 *N. Y.*, 556), but the court in deciding the case disregarded the circumstance relied upon by counsel to distinguish it from *Brown* agt. *Leavitt*. In *Paddon* agt. *Taylor* (44 *N. Y.*, 371) it was held that the defendant, who had received a warehouse receipt for property fraudulently obtained from the plaintiff in consideration of the surrender to the fraudulent vendee, who was insolvent, of his note past due, given for money loaned him by the defendant, was a purchaser for value. In *Clotlier* agt. *Adriance* (51 *N. Y.*, 322) one Bennett had purchased mowing machines of the defendants on credit, and on settling his account gave his notes to the defendants for the purchase-money, and also assigned to them, as collateral security, a mortgage, a life insurance policy of the value of forty-six dollars and fifty-eight cents, and notes purporting to be made by a third party. The mortgage and the notes assigned as collateral turned out to be fictitious and fraudulent. Afterwards Bennett, by fraud, procured the plaintiff to indorse his notes and turned them out to the defendants in payment of his notes given on the purchase of the machines, and they, in consideration thereof, surrendered to Bennett his original notes and the collaterals. The court held that the defendants were holders for value of the notes indorsed by the plaintiff by reason of the surrender of the original notes of Bennett. HUNT, Comr., said: "As the surrender of the notes of Bennett forms a sufficient consideration under our authorities, it is not necessary to discuss the effect of the surrender of the other instruments," citing *Brown* agt. *Leavitt*, *Pratt* agt. *Coman*, *Day* agt. *Saunders* and *Paddon*

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agt. *Taylor*. In *Mechanics' and Traders' Bank* agt. *Crow* (60 N. Y., 85) the cases of *Brown* agt. *Leavitt* and *Pratt* agt. *Coman* were cited with approval; but the note surrendered in that case was indorsed by a third person.

In view of this long line of authorities, it must be regarded as the settled doctrine in this State that the surrender by a creditor of the past due notes of a debtor upon receiving from him in good faith, before maturity, the note of a third person in place of the note surrendered, constitutes the creditor a holder for value of the note thus taken and protects him against the defenses and equities of the antecedent parties, and that it is immaterial whether the note surrendered was given to the creditor for goods sold or money loaned under circumstances which would leave the original debt represented by the note in existence enforceable against the debtor, or whether by surrendering the note the creditor parted with his entire right of action.

The principle upon which *Youngs* agt. *Lee* and the subsequent cases rest is, that the surrender of the debtor's note is an extinguishment of security surrendered, and that such extinguishment is a parting with value within the principle of *Coddington* agt. *Bay*. In *Youngs* agt. *Lee* the court say: "In the case before us the note was received in extinguishment of a demand upon a note not yet due and the note was delivered up. The surrender, upon a consideration, of a security not due extinguishes the security." And in *Pratt* agt. *Coman*, MASON, J., says: "If, however, it (the giving up of the note) did not discharge the pre-existing debt, it certainly operated to cancel the negotiable paper of the plaintiff; and this, as I understand the law, is a sufficient parting with value to constitute the plaintiff a *bona fide* holder of this note."

The surrender of a prior note to the maker under the circumstances of the cases cited, is unequivocal evidence of an intention on the part of the parties to the transaction to extinguish the note surrendered, and is equivalent to an express agreement to that effect. That the actual extinguishment and

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discharge of a prior debt upon the transfer of a note of a third person by the debtor to the creditor is a parting with value by the former was held in *Bank of St. Albans* agt. *Gilliland* (23 *Wend.*, 311), and *Bank of Sandusky* agt. *Scoville* (24 *id.*, 115). If these cases are in any respect inconsistent with prior or subsequent decisions of the court, the inconsistency is to be found in the conclusion that the prior debts were extinguished by the transactions in these cases, which it may be thought was reached upon evidence which, if the dealings had been between individuals, would not, according to some of the other cases, have been sufficient to establish an extinguishment. But it may well be that, by common understanding and usage, when a note is discounted by a bank to take a prior note held by the bank against the party procuring the discount, and the avails are credited to him, the transaction is to be regarded as an extinguishment of the prior note, although it may not be actually surrendered (*Slaymaker* agt. *Gundackers*, *Exr.*, 10 *S. & R.*, 75; *Bank of U. S.* agt. *Daniel*, 12 *Peters' R.*, 34; *Note to Cumber* agt. *Wave*, 1 *Smith's Leading Cases*, 458). While, therefore, we do not feel at liberty to disturb the rule established by *Youngs* agt. *Lee*, and the subsequent cases, it is quite manifest that the reason upon which they proceed is rather technical than substantial. There seems to be but little ground for holding that the surrender by a creditor of a past due note of a debtor, especially when his remedy upon the original debt remains, is a parting with value within the principle of *Coddington* agt. *Bay*, and we are not disposed to carry the rule established upon this subject further than has already been done. If we adhere to the reason of the rule in *Coddington* agt. *Bay*, which, as stated by Woodworth, J., is, "that the innocent holder having incurred loss by giving credit to the paper, and having paid a fair equivalent, is entitled to protection," *Youngs* agt. *Lee*, and kindred cases, should not be extended. In this case it is claimed that the surrender of the check of Brown, Pape & Co. was the same as the surrender of the debtor's note of the cases cited.

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We are of opinion that the cases are distinguishable. The check was not given to represent the debt. It was not taken or intended as a security for the debt. It was a false token taken by Founce in place of money. Brown, Pape & Co., by drawing and delivering the check, represented to Founce that they had funds in the bank upon which it was drawn, out of which, on presentation, it would be paid. They had no funds. The representation was false, and the bank refused to pay the check on presentation. It was not a payment of the debt to Founce any more than the turning out to him of worthless bank bills on a broken bank would be payment, and returning the check to the drawers was a surrender of nothing of value. It is true that an action on the check against the drawers might have been maintained by Founce; but they were at all times liable to him for the debt. It is said that the check operated as an acknowledgment of the debt, and that Founce having given it up would be compelled, if now obliged to seek his remedy against Brown, Pape & Co., to bring his action on the account, in maintaining which he would, or might, meet with difficulties which he would not encounter if he had retained the check. We are of opinion that this is quite too slight a circumstance upon which to found a judgment that Founce was a holder for value of the note in suit. There is no legal presumption that it would be more difficult to prove a claim upon an account than upon a check; certainly no such presumption can arise upon the circumstances of this case.

Our conclusion is, that this action cannot be maintained. It is conceded that Brown, Pape & Co. were not holders for value of the note, according to the laws of this state. Founce did not become such holder on the transfer of the note to him.

The plaintiff stands in no better position, having simply succeeded to his rights.

The point is suggested, on the brief of counsel, that the note having been transferred to the plaintiff in Massachusetts, the transaction is governed by the law of that state, which it

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it is said is different from the law of New York upon the point we have considered. It is sufficient to say that the point was not raised on the trial, and no proof was given as to the law of Massachusetts upon the question before us.

We cannot take judicial notice that the law of another state differs from our own (*McBride* agt. *The Farmers' Bank*, 26 *N. Y.*, 450; *Levanworth* agt. *Brockway*, 2 *Hill*, 201.)

The order of the general term of the court of common pleas, reversing the order of the general term of the marine court, should be reversed and the order of that court affirmed.

All concur.

NOTE.—The court holds that if a note instead of a check had been surrendered, the plaintiffs, under the adjudged cases, would have become *bona fide* holders of the note in suit, and as such entitled to recover. It may be difficult to recognize the practical distinction between a demand note and a sight draft or check drawn by and delivered to the same persons upon the same identical consideration.

The holder of either may sue upon the original cause of action, upon surrendering the demand note or sight draft upon the trial. The court, however, draws a marked distinction between the two cases. It holds that while a note is given as a representative of the debt, a bank check is given in lieu of money; that the giving of a check amounts in law to a representation that there are funds on deposit to meet it, and that if this representation is untrue, the check is a false token and in no sense payment.

This may be true; but is the innocent holder bound so to regard it? May he not elect to treat it as a payment of the debt in the same manner as he might have treated the debtor's demand note under like circumstances? Could he not sue upon it, and use it like a note as evidence of the debt?

The court says that the rule laid down in previous cases depends upon a technical rather than a substantial basis, and that it should not be extended; but is not the distinction adopted fully as technical as the rule itself? If the rule is unsound or unjust it ought to be overthrown, and one more consonant with justice declared.

Instead of overruling the technicality it is by this case divided and refined. [Ed.]

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SUPREME COURT.

WILLIAM S. PAINE, as receiver, agt. PETER C. BARNUM *et al.*

Savings banks — personal liability of trustees for alleged breaches of duty with respect to loans and disposition of the moneys of the bank — Legal representative of a deceased trustee proper party — Parties to whom the loans are charged to have been made need not be joined as defendants — Complaint — Demurrer.

Where a loan is made by a savings bank to three persons of \$20,000, \$15,000 and \$15,000, respectively, upon a promissory note by each for the amount he received, with collateral security of promissory notes of a foreign corporation, which notes are secured by trust deeds of such corporation upon unimproved vacant lots without the state, not worth over \$10,000 ; and where one of the trustees of the bank at the time of the loan was a large stockholder in said corporation, and the loans were intended to be and were in fact loans to the corporation ; such facts being known to the trustees of the bank, or could with reasonable diligence have been learned by them ; and where the loans were intended to be to said trustee, and were made because of his interest in the corporation, and the loans were in fact loans upon the security of the lots :

Held, that, under the laws of this state affecting savings banks, such transaction is unauthorized and illegal, and a demurrer to the complaint alleging these facts, in an action to hold the trustees personally liable, will not be sustained.

Held, further, that the persons to whom the loans are charged to have been made are not necessary parties defendant.

Held, also, that the legal personal representatives of a deceased trustee are properly joined with the surviving trustee.

Special Term, August, 1880.

THIS is an action brought by the plaintiff as receiver of the Bond Street Savings Bank, a bank incorporated under the laws of New York, against the surviving trustees of the bank, with whom is joined the legal personal representatives of John R. Willetts, deceased, who was, in his lifetime, a trustee with the other defendants.

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The trustees are sought to be held personally liable for alleged breaches of duty, with respect to loans and disposition of the moneys of the bank, which are claimed to have been unauthorized and illegal under the law and charter of the bank.

The plaintiff also alleges in his complaint that the loans were acts of gross negligence, and that the makers thereof were wanting in that care and diligence which a man of ordinary prudence uses in and about his own affairs, and which the trustees of savings banks are bound to use in the affairs of their trust, and which is required of them by law.

The defendants, the executors, &c., of Robert R. Willetts, and Sinclair Toucey, demur to the complaint, upon the ground that the complaint does not state facts sufficient to constitute a cause of action.

The executors of Willetts also demur upon the ground that there is a defect of parties defendant in the omission of the persons as defendants to whom the loans are charged to have been made, and also for that several causes of action have been improperly united in the complaint, viz.: a several cause of action arising out of the alleged acts, loans and investments complained of against the executors of Robert R. Willetts, deceased, and a joint cause of action against all the defendants sued as trustees, and not as representatives of trustees.

Wilson M. Powell, for defendants Willetts. *Arthur G. Sedgwick* and *E. Randolph Robinson*, of counsel.

Elihu Root, of counsel for defendant Toucey, for demurrer.

Barlow & Olney, for plaintiff, and *Francis C. Barlow*, of counsel, opposed.

VAN VORST, J. — The complaint alleges that the savings bank, on the 20th day of October, 1870, loaned on call to Emery Child \$20,000, to Leverett W. Murray \$15,000 and

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to Henry E. Seelye \$15,000; in all \$50,000. That the loans were made to these persons upon their promissory notes, each for the amount specified, payable on demand and bearing interest at the rate of ten per cent per annum; that at the time of the loans these persons, respectively, gave to the savings bank, as collateral security therefor, each a promissory note of the Riverside Improvement Company, an Illinois corporation, for the amount of the moneys loaned them, respectively, and which collateral notes were secured by trust deeds, executed by the improvement company and conveying land belonging to the corporation situated in the neighborhood of the city of Chicago, in the state of Illinois; that the notes of the improvement company were severally dated on the 20th day of October, 1870, and payable in three years from their respective dates, and each was made payable to the order of one of the three persons above-named, who gave it as security to the savings bank; that each of the borrowers, at the time of the borrowing, gave to the bank an instrument in writing authorizing the sale of the collaterals given for the loans, respectively, upon default being made in the payment of the loans, respectively, at private or public sale; that Childs was at the time the president, Murray the secretary and Seelye the treasurer of the improvement company.

The complaint alleges that the lots covered by each of the trust deeds were not fairly and reasonably worth, at the time of the loans, double the amount for the security of which the trust deed was given, or double the amount loaned by the bank upon the security of each note and the accompanying trust deed. That the lots covered by the trust deeds were, at the time of the loans, vacant lots, unbuilt upon and unimproved, and yielding no income or rent, and incapable of yielding any income or rent, and were not productive; that all of the lots were merely the prairie in its natural condition, and were not laid out by streets or otherwise; that they had no present or actual value other than the value of wild, unimproved prairie land at a distance of twelve miles from Chicago, any other

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value being purely speculative and depending on the success of a building speculation; that the aggregate value of all the lots at the time did not exceed \$10,000, and that they were not now worth \$5,000; that the defendant David S. Dunscomb, one of the trustees of the bank at the time of the loan, was a large stockholder in the Riverside Improvement Company and had a pecuniary interest and ownership in its property and affairs, and that the loans were intended to be, and were in fact, loans to the company and not to the nominal borrowers; and that all the facts above stated were at the time known to the trustees and officers of the bank, and to such of these defendants as were such trustees or officers, who are now represented by the defendants sued in a representative capacity, or could have been learned by them with reasonable care, skill and diligence and attention to their duties; and that the loans were intended by those who made them to be loans to and a using by Dunscomb or for his benefit, and were made because of his interest in the company.

The complaint alleges that the taking of the notes of the borrowers was intended to be, and was, a mere device to make it appear that the loans were not made upon the security of the lots, but that Childs, Murray and Seelye were not persons of such pecuniary responsibility as that the loans would have been made to them except for the security of the trust deeds, and that the loans were, in effect, loans upon the security of the Illinois lots; that Childs, Murray and Seelye were all residents of Chicago, in the state of Illinois.

Under the statutes affecting this savings bank and the trustees thereof, the transactions above referred to cannot be justified. A brief reference to some of the statutory and charter provisions will, I am sure, make this result reasonably clear.

By the sixth section of the act under which the bank was chartered (*Laws of 1860, chap. 280, as amended by chap. 408 of the Laws of 1866*), it is provided that no loan on bond and mortgage should be made except upon productive property

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worth double the amount to be secured thereon; and by the sixth section of chapter 257 of the Laws of 1853, savings banks are prohibited from loaning their funds upon notes, bills or any other personal security whatever. By the provisions of chapter 845 of the Laws of 1868, trustees of savings banks are prohibited from loaning moneys on the security of lands situated without this state. The transaction in question was a transgression of the above-mentioned statutory provisions, and in so far as the trustee Dunscomb was interested personally in the loans it was a breach of the sixth section of chapter 280 of the Laws of 1860, which provides "that no trustee shall, directly or indirectly, borrow any of the funds of the bank, or in any manner use the same except to pay necessary current expenses."

Beyond the authority and powers expressly conferred by the statutes and charter, and such as is necessarily implied, with respect to loaning or employing the moneys of the bank, the trustees could not legally advance. These constitute the reasonable limits which circumscribe their action.

If this transaction be regarded either as a loan on the notes of the individuals, Childs, Murray and Seelye, who were the officers of the improvement company, or on those of the company itself, or as a loan upon the security of the land, which was not productive property or worth double the amount advanced, and which was situated without this state, or as a loan, directly or indirectly, to the trustee Dunscomb, in no view can the transaction be pronounced a legal or proper exercise of power by the bank, its officers and trustees. But it is urged, in support of the demurrer, that the provisions of the charter and statutes apply only to permanent investment of the moneys of the bank, and that the investment in question was within the powers conferred by the sixth section of the charter in the words following:

"It shall be the duty of the trustees of said corporation to invest as soon as practicable in public stocks or public securities, or in bonds and mortgages, as provided for in this act,

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all sums received by them beyond an available fund of not exceeding one-third of the total amount of deposits with said institution at the discretion of the said trustees, which they may keep to meet the current payments of said corporation, and which may by them be kept on deposit, on interest or otherwise, in such available form as the trustees may direct."

By this section, it is true that the trustees are vested with a discretion, but that is only with regard to the amount they might keep as an available fund to meet the current payments of the corporation, and which was not to exceed one-third of the total amount of the deposits. But there was no discretion as to how the money was to be kept. It was to be kept on deposit, on interest or otherwise, in such available form as the trustees might direct.

The intention of this clause, and which should be observed in its construction, was to keep, in substance, within reach, a fund ready and available at all times, to meet the current payment which the corporation should be called upon to make. Hence it was directed to be kept on deposit, on interest or otherwise; that is, if interest on the deposit could not be had, they might hold or deposit the same without interest.

The words "in such available form as the trustees may direct," with which the sentence ends, are controlled by the words "kept on deposit," antecedently used, and are not to be construed as authorizing any other disposition or appropriation of the moneys than their being kept and held on deposit, on interest or otherwise.

The plain object of the legislature, in directing these moneys to be so kept as an available fund to meet current payments, would be wholly defeated by any loan or investment of them on notes, mortgages or otherwise. Such loan or investment of this fund would render it practically unavailable in case of need to meet "current payments."

It can with no propriety be argued that the transaction under consideration, by which the funds, instead of being kept, were parted with and sent out of the state, and their

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repayment attempted to be secured by the notes of a corporation and citizens residing out of this jurisdiction, and by unimproved land situated in the state of Illinois, was within the power of the trustees. No trustee could for a moment honestly believe that such disposition of the fund was an observance of either the letter or the spirit of the laws to which the corporation and the trustees were subject. If the trustees were prohibited from so investing the moneys of the bank over and above what was needed as an available fund to meet current expenses, *a fortiori*, they would not be justified in so placing the available fund.

The latter part of the sixth section contains, in terms, a clear expression of the legislative intention as to how this fund should be kept, the word "deposit" not being relinquished. "Temporary deposits may be made in any of the incorporated banks, or in any of the associations which are now or may hereafter be formed under the general or national banking law in the city of New York, and interest may be received at such rates, not exceeding that allowed by law, as may be agreed upon."

I am referred, by the learned counsel for the plaintiff, to an opinion of the late attorney-general Schoonmaker, to the bank department, of the date of October 21, 1878, in which the provisions of a bank charter similar to the one under consideration were discussed by him, in which, amongst other things, he says: "This available fund the trustees may keep to meet current payments, and it may be kept on deposit, on interest or without interest, or in such available form as the trustees may direct. The phrases "available fund" and "available form" are used in contradiction to investment. They do not denote another form of investment or a duty to invest, but a permission to leave uninvested * * * Investing money is parting with it. But the act provides it may be kept on interest or without interest, or in such available form as the trustees may direct. As the money itself must be kept in an available form, that is, available for making

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current payments, the only other available form, except on deposit where it may be drawn on by check, is in money itself, in the vaults of the institution."

I think the construction given by the attorney-general is sound. The terms of the act are so clear, and the intention of the legislature so apparent, that I am at a loss to see how any reasonable doubt can arise with respect to its meaning in this regard.

But it is urged by the learned counsel for the defendants who demur that the transaction which obtained their sanction was not a loan, but a purchase of certain Riverside mortgages, and that the loans upon which the complaint is based, and which are therein styled "call loans," are a wholly different transaction. But from the views above expressed, it was quite as improper and equally illegal to use this fund for the purchase of these mortgages as it would have been to loan it upon the notes, with the mortgages as collateral.

The committee to whom the matter was referred, with power to purchase, visited the property and recommended the loan. The trustee, Dunscomb, who had a pecuniary interest to advance, as is alleged, "was very active in promoting and obtaining the same."

When the private interests of a trustee are to be advanced, the corporate interests as well as those of creditors become subordinate and are apt to be sacrificed.

The transaction must be held, in every view in which it may be regarded, as *ultra vires*, and the trustees who sanctioned the same are liable for breach of duty, and must make good the loss (*Ackerman agt. Emmott*, 4 *Barb.*, 626; *Clough agt. Bond*, 3 *Mylne & Craig*, 490; *Potter on Corporations*, vol. 1, sec. 324).

Robert R. Willetts, the testator whose legal personal representatives demur, is sufficiently connected with the transaction by the allegations of the complaint to charge him not only with active participation in, but with knowledge of, the transaction in the form which it assumed. He actively par-

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ticipated in putting the matter in course of completion, and was chargeable with all that was done with respect to the placing of this money. He never objected, and by his knowledge and means thereof, acquiesced in and adopted whatever was done by his associates and the officers of the bank.

Besides the positive illegality of the transaction the facts alleged in the complaint justify the charge of gross and inexcusable negligence on the part of the testator Willetts and the other defendant, who demurs. The facts constituting such negligence are sufficiently alleged in the complaint.

Trustees of savings banks are under a positive duty to see to it that the funds of the bank are not invested contrary to law, and a disregard of such obligation is a breach of duty and a ground of liability.

A trustee of a corporation should not be exposed in the end to a liability which could not be reasonably anticipated, nor for the consequences of an honest error in judgment, where he is by law clothed with a discretion. But when the law speaks plainly he will avoid liability by following its directions, and the line of obedience is, in this regard, the path of safety.

A trustee of a bank cannot, however, close his eyes and remain passive while his associates are wasting by improvident investment the moneys of the corporation, the entries in respect to which all appear upon the books with which he is presumed to be cognizant. (*See note to Lacy agt. Hill*, 20 *Eng. R.*, 755).

It is his duty not only actively to oppose such conduct but to invoke the needful measures to restrain its continuance, and by timely action seek to recover back the moneys. (*Crane agt. Heam*, 26 *N. J. Eq.*, 378; *Styles agt. Gray*, 1 *MacN. & G.*, 422; *Hanbury agt. Kirtland*, 3 *Sim.*, 265).

If there are any facts in existence to exonerate the defendants from liability they must be interposed by answer, as sufficient appears upon the face of the complaint to charge them with both illegal and negligent conduct.

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But it is further urged by the demurring defendants that the complaint does not show that the plaintiff has exhausted his remedy against the persons who were primarily liable to the bank.

The complaint alleges that interest on the loans was paid to October 20, 1872, and no longer; that the officers of the bank, before the appointment of the plaintiff as receiver, under their power to sell the collaterals, sold the notes of the improvement company and bought them in for the aggregate sum of \$6,100; that the bank foreclosed the mortgage and bought in the lots, and it is averred, also, that Childs, Murray and Seelye are insolvents and worthless, and that the property bought in does not exceed in value \$5,000.

It is not to be supposed that the liability of the trustees is founded upon the notion that they are sureties simply, or that it arises upon a contract express or implied. They are prosecuted for their own wrong in making and in allowing to be made illegal investments of the moneys of the bank. The wrong involves a clear breach of statutory obligation. When that is alleged and proved the plaintiff's cause of action is made out. This breach of duty implies loss and damage. The amount which may in the end be recovered will depend upon the facts proved as to the extent of the loss actually sustained.

The complaint shows that the loans, although long past due, remain unpaid, that the collaterals have been sold, by which considerable loss appears, and that the notes of Childs, Murray and Seelye are of no value whatever.

If the loss has been increased by any fraudulent or negligent action of the receiver, with respect to the securities or their treatment, it must be interposed by answer and proven on the trial, when it will, doubtless, be considered by the court in estimating the damages. And provision can also be made by the judgment for substituting the defendants to the receiver's rights to the property and securities upon the payment of the damages. But the mere fact that the makers of

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these notes, non-residents of this state, who have omitted to pay them, and who are alleged to be worthless, have not been sued, and all legal and equitable remedies against them exhausted without success, is no defense to this action.

The above, I think, covers the substance of the objections urged by the defendant's counsel in support of the ground of demurrer; that the complaint does not state facts sufficient to constitute a cause of action. In detail, other objections are urged, but they have all been considered, and are believed to be disposed of by the principles above announced. This ground of demurrer, therefore, must be overruled. It is also objected by the demurring defendants that there is a defect of parties defendant, it being claimed that Childs, Murray and Seelye are necessary parties. It is urged in support of this objection that these parties received the moneys of the savings bank by means of the alleged breaches of trust, and that they were chargeable with notice of the limitations of power imposed by the charter of the bank, and that they are jointly liable with the defendants to the bank.

In equity cases, as a matter of convenience and in order to avoid multiplicity of action, and where contribution may be had from those who participated in the wrongful act by which trust property has been misappropriated, those who received the money or property with knowledge of the wrong may be united as defendants with the trustees, and the court frequently compels them to be brought in (*Sherman agt. Parish*, 53 *N. Y.*, 483). Where a *tort-feasor*, however, is sued at law, he must get his contribution in a separate suit if he is entitled to it.

Although there are allegations which would clearly entitle the plaintiff to legal redress in the way of damages, yet in the prayer for relief he does ask for equitable relief. And although I cannot determine whether the plaintiff will bring the case to trial at the special term in equity or before a jury, yet the objection will be considered as though this was an action in equity and to be tried as such.

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Whether the persons named are necessary parties, the objection being raised by demurrer, must be determined by the allegations of the complaint, and as to whether it discloses facts which absolutely call for the presence of these parties as having incurred liability to the plaintiff with the defendants, or as absolutely bound to contribute with the defendant to meet the losses sustained by the bank.

It does not necessarily follow, from the allegations of the complaint, that Childs, Murray and Seelye, or either of them, were knowingly concerned in the breaches of trust with which the defendants are charged, or that they received the money with actual notice of the limitation upon the power of the trustees to make loans, contained in their charter. Had that been alleged the defendants could without doubt, under the rule and practice of courts of equity above referred to, have well insisted that these persons being concerned in the breaches of trust should be brought in and made to respond in an effective manner. It does not follow that every person who borrows money of a savings bank is necessarily implicated in a breach of trust by the trustees who have exceeded their powers, and by the simple act of receiving the money, although innocent in fact, become a *quasi* trustee with the offending officials. As the complaint does not allege knowledge in these persons or the limitations of powers contained in the charter of the bank, or any facts from which such knowledge must be inferred, it cannot be implied. It was evidently not the design of the pleader so to implicate these persons. If it had been he would have stated facts to charge them. Being severally residents of another state at the time of the loan there is no necessary presumption that they were cognizant of the limitations contained in the local laws of this state. At least such implication alone would hardly justify the court in deciding that this action should not proceed until such persons so sought to be charged with liability should be brought in as defendants. Should it, however, appear from the facts adduced when this action comes on to be tried upon

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the merits that these persons are necessary parties they may then be ordered to be brought in.

To this it may be added that for the moneys borrowed, notes were received by the bank from the borrowers, and the transaction, in the form in which it was made, was afterwards ratified by the bank by a sale of certain collaterals and the foreclosure of the mortgage. The makers of the notes are still liable upon them, and their payment may be enforced in an action at law; and to the rights of the corporation and the plaintiff, as receiver, the defendants, on payment of the damages sustained through the breach of trust, may be subrogated; and for that purpose the notes may be ordered to be surrendered to them, and I conclude that that would be the more reasonable and simple method for obtaining indemnity by the trustees.

Besides, as already stated, these persons are non-residents of this state and are alleged to be insolvent. As the rule in question is founded in part upon convenience, the burden and inconvenience of proceedings to bring in non-residents, if it could be effectively done, should not be cast upon the plaintiff when the persons asked to be brought in are insolvent and have no property in this state out of which contribution could be enforced, and who cannot be made amenable to final process here in so far as it affects the person.

There is not, as is urged by the learned counsel for the defendants who demur, any misjoinder of causes of action. There is, in fact, but one cause of action alleged in the complaint, and considered as an equity action it was proper to join as defendants the legal personal representatives of the deceased trustee Willetts with the other defendants.

There must be judgment for the plaintiff on the demurrer with liberty to the defendants, however, to answer in twenty days on payment of costs.

Paine agt. Irwin.

SUPREME COURT.

WILLIS S. PAINE, as receiver of the Bond Street Savings Bank, agt. ROBERT IRWIN and others.

Savings banks—purchase of mortgages from a trustee of such bank condemned—Such transaction ultra vires.

Where a savings bank in the city of New York purchases from a trustee of such bank bonds and mortgages owned by him, aggregating \$32,000, made by one person upon unproductive property in the city of Brooklyn of uncertain value, not worth twice the value of the mortgages, such transaction is *ultra vires*.

Special Term, August, 1880.

Wilson M. Powell, attorney for defendant Willetts, executor, &c., and *Arthur G. Sedgwick* and *Edmund Randolph Robinson*, of counsel, for demurrer.

Elihu Root, attorney and counsel for defendant Toucey.

Barlow & Olney, attorneys, and *Francis C. Barlow*, of counsel for plaintiff, opposed.

VAN VORST, J.—It is unnecessary to repeat the reasons which led to the conclusion that the demurrers in the action in favor of this same plaintiff against Barnum and others (*ante*, 303) could not be sustained. In so far as it is applicable, what was there decided as to the liability of the trustees of the Bond Street Savings Bank must be regarded as the law of this case.

The case, however, has some features peculiar to itself. The complaint contains two causes of action. In the first the defendants are sought to be held liable for an alleged breach of trust, in appropriating the moneys of the bank in the purchase of four bonds and mortgages for \$8,000 each, made by

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one Donnelly; the mortgages being upon property in Vanderbilt avenue in the city of Brooklyn. These bonds and mortgages were owned by George W. Mead, a trustee of the bank, and were purchased from him by the bank, with its funds, by the direction of the trustees. The testator of the defendants who demur, as well as the defendant, Toucey, voted for and approved the purchase.

It is alleged that the mortgaged premises were not productive property, and that its value was uncertain, contingent and speculative, dependent upon the completion of buildings thereon; that the premises were not worth twice the amount of the mortgages.

The purchase of these mortgages was *ultra vires*. The following are some of the reasons for such conclusion:

They were purchased from a trustee. Such dealing by trustees with a co-trustee is in itself open to just objection, but the transaction is in violation of the prohibition contained in section 6 of the charter of the bank, to the effect that no trustee shall, directly or indirectly, borrow any of the funds of the bank, or in any manner use the same except to pay necessary current expenses. Trustees who sanction such use of the money by a co-trustee, equally with him, violate the law.

The force of this prohibition is not avoided by resorting to a purchase from a trustee of mortgages, instead of loaning money to him thereon. When the substance of the statute is violated, the form which is given to the transaction is immaterial.

It was also a violation of the provisions of the charter which prohibit lending more than \$20,000 to one individual on bond and mortgage. Buying mortgages is as much within the prohibition as lending money and taking mortgages. In addition, the mortgages were upon unproductive property not worth double the amount, as required by section 6 of the charter. For the purposes of this demurrer, I think the complaint sufficiently shows loss. A breach of statutory obligation and a violation of duties imposed, may well be presumed to be

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followed by loss. But the complaint discloses actual loss — its amount is yet to be determined on the trial.

The other objections to this cause of action are sufficiently covered by what is said in the case of *Paine, receiver, agt. Barnum and others* (*ante*, 303).

The objections to the second cause of action are not well taken. The concurrence in, and sanction of, the loan upon vacant lots by the testator, Willetts, and the other trustee, who demurs, clearly appear. It is averred that they voted for it. It was as effective to do so as members of the finance committee, as in the full board. As trustees they approved of this improper use of the moneys of the bank.

There must be judgment for the plaintiff on the demurrer, with liberty to the defendant to answer on payment of costs.

SUPREME COURT.

WILLIS S. PAINE, as receiver, &c., agt. ERASTUS F. MEAD *et al.*

Savings banks — Responsibility of trustees for the acts of its officers — Complaint — Demurrer.

A transaction entered upon the books of a savings bank, although made by the bank officers, is presumed to have been done with the knowledge and assent of the trustees, who are responsible for the acts of the officers whom they place and retain in position.

Special Term, August, 1880.

VAN VORST, J. — The loan in this case to Benjamin W. Wright, of the sum of \$25,000, payable on demand, on the security of a bond and mortgage on premises called "Boscobel," in Westchester county, was, under the facts alleged, an illegal and grossly negligent act.

The sum loaned exceeded the amount in that manner directed to be invested by the charter, and was upon vacant

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and unproductive land, not worth twice the sum loaned. For the reasons assigned in the opinion in the case of *Paine, receiver, agt. Barnum* (*ante*, 303), the transaction cannot be sustained as a legal application or use of the available fund.

The complaint alleges that the loan was not an act of that degree of care, skill and prudence which a prudent man would use in and about his own business, and that it was an imprudent, foolish and improvident act. The truth of these allegations are admitted by the demurrer.

The transaction was at the time entered on the books of the bank, and, although made by the bank officers, it is presumed to have been done with the knowledge and assent of the trustees. They are legally chargeable with notice of the acts of the officers in and about the business of the bank, especially when they are entered on the books, and if they would escape liability they must dissent from and oppose illegal or improvident action, and seek to remove officials who do them.

The trustees are responsible for the acts of officers whom they place and retain in position. But the complaint contains allegations charging the trustees with knowledge and approval and ratification of the act. This renders them liable. Their defense, if any, must be interposed to the merits.

Neither of the grounds of demurrer are well taken, and there must be judgment for the plaintiff, with liberty to defendants to answer on payment of costs.

Dwight agt. Merritt.

U. S. CIRCUIT COURT.

FREDERICK A. DWIGHT and JAMES D. PLATT agt. EDWIN A. MERRITT, collector of the port of New York.

Action at common law — Form of process — Regularity of summons for the commencement of action — Amendment of process.

A summons or notice to the defendant for the commencement of a suit is certainly process quite as much as a *capias* or a subpoena to appear and answer is process, and must be issued by the court under its seal.

A summons signed by an attorney, but not under the seal of the court, is not such process as is intended by the statute.

The power to amend the process given by sections 948 and 954 of the United States Revised Statutes is power to amend a want of form in process, but does not apply to a summons in this form. There must first be a process to be amended; and a summons issued in this manner is no process.

August, 1880.

Thomas I. Rush, for plaintiffs.

Stewart L. Woodford, for defendant.

BLATCHFORD, J. — In this case an attempt has been made to commence a suit at common law in this court by serving on the defendant a paper purporting to be a summons in the form prescribed by the statute of New York for commencing a civil action. It is signed by the plaintiffs' attorney, but is not under the seal of the court. A summons or notice to the defendant for the commencement of a suit is certainly a process quite as much as a *capias* or a subpoena to appear and answer is process. The statute intends that all processes shall issue from the court where such process is to be held to be the action of the court, and that evidence that it issues from the court and is the action of the court shall be the seal of the court and the signature of the clerk. It is clear that a signature by the plaintiff's attorney without a seal, and an issuing from the office of such attorney, cannot be substituted. There

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is nothing in the provisions of the Revised Statutes as to the conformity in practice and forms and modes of proceeding in civil causes, other than equity and admiralty causes in the courts of the United States, to the practice and forms and modes of proceeding in like causes in the state courts, which abrogates the provisions of section 911, Revised Statutes. The two must be so construed as to stand together. The defendant moves to set aside the summons because of the foregoing defects before appearing generally in the suit, and the plaintiffs ask to be allowed to amend the summons *nunc pro tunc* by having the seal and the signature added. It is alleged that the statute of limitations would be a bar to a new suit. Power to amend the process is said to be given by sections 948 and 954. That power is power to amend a want of form in process; but there must first be a process to be amended. There must be something to amend and to amend by. This paper is no process. The process which can be amended under the power conferred, is process issuing from this court. This paper never issued from the court. The motion of the defendant is granted, and the motion of the plaintiff is denied.

SUPREME COURT.

DARIUS MILLER and another, respondents, agt. ELMORE KENT,
appellant.

*Examination of a defendant before trial — when order for should be allowed —
Practice — Appeal — Code of Civil Procedure, section 878.*

Upon appeal from an order denying a motion to vacate a previous order, the appellate court should not listen to the objection that the order to show cause on such motion did not specify the irregularities or grounds upon which it was sought to set aside the original order, unless it appears that such objection was made in the court below.

Where, upon motion for the examination of a defendant before trial, the affidavit states enough to show the materiality of the examination,

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other facts and conclusions stated by way of argument to show the materiality of testimony to meet alleged defenses should not, under the circumstances of this case, defeat the examination.

Where a broker or commission merchant withholds the fullest information to his customer in relation to property alleged to have been bought or sold, the right to examination before trial in an action to recover alleged profits or to adjust unsettled accounts should be fully accorded.

First Department, General Term, July, 1880.

THIS is an appeal by defendant Kent, from an order made by Mr. justice LAWRENCE denying a motion to vacate his order directing the defendant Kent to appear and submit to an examination under section 873 of the Code of Civil Procedure. This action was brought to compel the defendants, Poole & Kent, to account to the plaintiffs for the profits on certain large purchases and sales of lard which the defendants, Kent & Poole, between the 1st day of August, 1879, and the 16th day of January, 1880, made for account of the plaintiffs and others as their brokers and agents, under and in pursuance of an agreement annexed to and forming part of defendants' answer. In the course of these and other transactions, certain deposits of money and stocks were made with said Kent & Poole by plaintiffs. Since the 1st of October, 1879, plaintiffs have been importuning defendants to furnish an account of these purchases and sales, but the defendants, Kent & Company, have neglected and refused to render any account, except a general statement, in which they claim a balance due them of \$11,000. But how, when and through what transactions that alleged indebtedness arose, the defendants refused to reveal. Plaintiffs are informed by all of the defendants (except Kent & Poole) that the profits upon the aforesaid purchases and sales amounted to over \$200,000. In addition to those profits, Kent & Poole have obtained from plaintiffs, during the period covered by the transactions set forth in the complaint, \$125,000 in cash, and more than \$180,000 in shares of stock, for which they also refuse to account. The object of the examination is to ascertain on what days the several

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purchases or sales of lard, which the defendants say they made for plaintiffs' account, were made. By whose authority they were made, and at what price they were made, to whom the lard was delivered; from whom it was bought; and whether these several purchases or sales were made on credit or for cash.

Adolphus D. Pape, for respondent.

I. As the defendant seeks to vacate the order for the examination on the ground of irregularity, he must be regular in his proceedings. Defendant's order to show cause fails to state on what ground he claims the order should be vacated. If defendant in his papers does not point out the irregularity, the order cannot be vacated for that reason (*Barker* agt. *Cooke*, 40 *Barb.*, 254; *Selover* agt. *Forbes*, 22 *How.*, 477; *Perkins* agt. *Mead*, 22 *How.*, 476; *Lewis* agt. *Graham*, 16 *Abb.*, 126; *Roche* agt. *Ward*, 7 *How.*, 416). The defect is not cured by setting forth the irregularity in the affidavit (*Montrait* agt. *Hutchins*, 49 *How.*, 105).

II. The order should be affirmed on the merits. The affidavit of Gould sets forth five grounds on which they ask to vacate the order. The answer to the first ground specified in Gould's affidavit is, that the testimony sought, is to be used on the trial, and also to prepare for the trial, he being the only one from whom the information can be obtained. We refer to the affidavit of Nathan G. Miller, which discloses the object of the examination, and the grounds stated are sufficient. To his second ground we answer by saying that we only showed the statements and the general conduct of Kent in the transaction, and that in order to get at the truth we desire to examine him under oath. The rule that where a party calls a witness on his own behalf he must assume him worthy of belief will apply to this case. As to the third ground, we reply that it is frivolous, and the defendants' counsel did not press it on the argument, and as he has not printed the answer he has waived it. The substance of the answer is

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given. As to the fourth ground it is only necessary to state that every attempt to examine the defendant has been resisted. It would be useless to examine defendant in any other manner than under an order of the court. The rebutting affidavit clearly shows why the alleged offer was not accepted. As to the fifth ground, we reply that the Code makes no distinctions between the actions in which an examination can be had. Before an accounting can be had plaintiffs must establish a cause of action. To assist them in this they desire Kent's testimony. Instead of calling him on the trial they avail themselves of the right of calling him before trial. An examination can be had in an action for an accounting (*Livingston agt. Curtis*, 12 *Hun*, 121).

III. The affidavit on which the order for the examination was granted is sufficient, for it shows: 1. The names of the parties with their addresses, as well as the names of the attorneys. 2. That an action is pending. The nature of the action and the nature of the judgment demanded. 3. How the examination is material and necessary. 4. The nature of the testimony sought. 5. That the information is within the defendants' knowledge, and not within the knowledge of plaintiffs. 6. That it is sought to enable plaintiff to prepare for the trial. 7. It also shows the duty of defendant to give plaintiff the information. His offer to do it, and refusal to make good his offer. His efforts to conceal that information and his bad faith in refusing to render his accounts, and his inexcusable conduct in the whole course of the proceeding.

IV. The following cases illustrate and support the right of the plaintiff to the examination (*Livingston agt. Curtis*, 12 *Hun*, 131; *O'Reilly agt. W. U. Tel. Co.*, 12 *Hun*, 124; *Glenny agt. Stedwell*, 1 *Abb. N. C.* 327; *Shepmois agt. Bousson*, 52 *How.*, 401).

L. A. Gould, for appellants.

DAVIS, *P. J.* — An order was made in this case by Mr. justice LAWRENCE, requiring the defendant Kent to appear and

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be examined as a party before trial, under section 873 of the Code of Civil Procedure. A motion was afterward made at special term, at chambers, to vacate the order of examination, which motion was denied, and from the order entered upon such denial this appeal was taken. The point was made on this appeal that the order to show cause on this motion did not specify the irregularities or grounds upon which it was sought to set aside the original order, and that, for that reason, the order appealed from should be affirmed; but it does not appear that any such objection was made or suggested in the court below, and it does appear that the motion was heard and disposed of upon the merits. Under such circumstances the appellate court should not listen to the objection, because if made below it might readily have been obviated by allowing the statement of such irregularities to be inserted in the notice, and granting a new order to show cause upon the spot.

On looking into the merits of the motion upon the papers presented we are satisfied that the plaintiff was entitled to the examination. Issue had been joined and the case was ready for trial as between the parties to the issue. Enough was stated in the affidavit to show the materiality of the examination. Other facts and conclusions were stated, by way of argument, tending to show the materiality of the testimony as a matter of preparation to meet the alleged defenses, but that fact should not, under the circumstances of this case, defeat the examination. The plaintiffs show to our satisfaction that they could not get such an account of the transactions of the defendants, alleged to have been made on their behalf, as they were clearly entitled to. A commission merchant or broker has no right to conceal from his customer any portion of his business and dealings in relation to the property alleged to have been bought and sold; and where he withholds the fullest information on that subject, the right to examination before trial in an action brought to recover alleged profits, or to adjust the unsettled accounts, should be fully accorded. We are not at all satisfied with the good faith of the alleged proffers of

Edleson agt. Duryee.

the examination of the defendants' books, &c. The disingenuousness of the attempt thus to defeat the examination of defendant as a witness must have struck the court below as it does this court. We think the order should be affirmed, with ten dollars costs and disbursements.

Order affirmed.

BRADY and BARRETT, JJ., concur.

SUPREME COURT.

MADDELINE W. EDLESON agt. JOSEPH W. DURYEE.

Costs — not allowed in ex parte order.

Costs should not be allowed in an *ex parte* order directing defendant to file his answer.

First Department, General Term, July, 1880.

APPEAL from order sustaining allowance of costs in an *ex parte* order directing the defendant to file his answer within five days, or, in default, that it be deemed abandoned.

Carlisle Norwood, for appellant.

Ernest T. Fellowes, for respondent.

PER CURIAM. — The appellant is right in his contention. The order to file the answer was *ex parte* and costs should not have been allowed (*Boune* agt. *Armstrong*, 13 *How.*, 301). Besides it was a judge's order (*See Brevoort* agt. *Warner*, 8 *How.*, 321). A party might as well insert motion costs in an order of arrest or for time to answer. The order should be reversed, with ten dollars costs and disbursements of the appeal.

Matter of Rosenthal.

N. Y. SURROGATE'S COURT.

In the Matter of the Estate of CAROLINE ROSENTHAL.

Constitutional law — Surrogates — Chapter 894, Laws of 1870, unconstitutional.

Chapter 894 of the Laws of 1870, entitled "An act to confer additional powers upon surrogates and to authorize an examination as to the effects of deceased persons," is unconstitutional, inasmuch as sections 5 and 6 thereof are clearly unconstitutional and the act indivisible.

August, 1880.

Fraser & Minor, attorneys for estate.

Joseph Bellesheim, attorney, and *A. C. Anderson*, of counsel, for witness.

CALVIN, *Surrogate*. — The administrator of this estate, upon the usual affidavit that Jones Weil has possession of property belonging to the estate of decedent, instituted an inquiry under chapter 894, Laws of 1870, and procured a subpoena requiring said Weil to attend and testify touching the goods, chattels and effects of decedent, which appears to have been duly served upon him. On the return day he appeared by counsel and objected to the further proceeding and moved to dismiss the same on the ground that the law under which the subpoena was issued was unconstitutional, and cited *Matter of the Estate of Beebe* (vol. 10, No. 7, *N. Y. Weekly Dig.*, 161), in which it is held that the act aforesaid is unconstitutional because it enabled an administrator or executor to obtain possession of property claimed by him, without such trial as is recognized by the Constitution and the ordinary forms of judicial proceedings. A similar statute relating to the powers of the public administrator, and found in 3 Revised

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Statutes (6th ed., section 8, &c.), and which, as early as 1855, came under consideration of the late learned surrogate BRADFORD, of New York, in the *Public Administrator* agt. *Ward* (3 *Brad.*, 244), when it was held where deceased had no possession of the property at his death, or twenty days previous, and no advantage had been taken by attendants, but the claim was adverse to him in his lifetime, the statute was not intended to apply; and yet the learned surrogate said, at page 247, "the provision restraining the issue of the warrant, if a bond be given, of course implies that a warrant may issue when there is an adverse claimant." Notwithstanding that opinion of judge BRADFORD, it has been the uniform practice of the present surrogate under that statute, as under chapter 394 and section 7 of chapter 359 of the Laws of 1870, to deny the warrant when on examination there appeared to be an adverse claim to the property; that the act was not a substitute for the action of replevin, and, as thus administered, neither of those acts appear to be, in letter or spirit, a violation of the Constitution. But if judge BRADFORD was right in holding that the act contemplated the issuing of the warrant in the absence of the bond, though there was an adverse claim, the decision *In the Matter of Beebe*, above cited, would seem to be correct. At first thought it occurred to me that the proceeding was analogous to the provisional remedy of replevin under the Code, but then the property is seized by the sheriff in a suit thereby commenced in which the usual defense may be made, and trial by jury had, after the plaintiff has given security to protect the rights of the defendant, while by the act under consideration, as interpreted by the general term of the third department and by judge BRADFORD, the defendant, in order to secure his defense according to the usual practice and trial by jury, must give security in order to retain the property claimed by him, which he may be unable to do, and in that respect the analogy fails. It is, however, entirely apparent that it would greatly facilitate the administrator or executor of an estate in procuring possession of its effects, to

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provide for such a subpoena and examination, and to put the person in possession to the responsibility, under oath, of stating any claim he may have to it, and if he shall admit possession without right as against the estate, to afford the speedy and inexpensive remedy of a warrant for its seizure and delivery.

Out of respect for the authority of the general term the proceedings must be dismissed.

SUPREME COURT.

In the Matter of GUSTAVUS A. BRAKE.

Practice — Effect of special term caption on ex parte order.

A special term caption does not alter the real character of an *ex parte* order, or deprive an adverse party of the right to move on notice to vacate or modify it.

An order appointing a trustee and directing payment to him of moneys under the provisions of a will, which the court has, by decree, declared to be inoperative, is void; and such trustee being an alien and non-resident, the application for such order was an attempt to evade the provisions of the decree.

First Department, General Term, July, 1880.

APPEAL from order vacating an order appointing a trustee and refusing to punish for contempt.

John A. Kaufing, for appellant.

R. E. Robinson, for respondent.

BARRETT, J. — The appellant is entirely incorrect in his contention that it was incompetent for the court below to make the order appealed from. It was not a case of one judge attempting to set aside the order of a brother judge, but of

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the special term upon due notice, and after hearing both sides, vacating an *ex parte* order. This was correct and ordinary practice. It is true that the *ex parte* order had the special term caption. But that did not alter its real character, nor deprive the company of their right to move the court, upon notice, to vacate or modify it. It only prevented them from applying to another justice, *ex parte*, for such vacation or modification. Upon the merits, it is entirely clear that the order appointing the trustee, and directing the company to pay over, was improvidently made. This was so even upon the papers upon which it was granted. There was no power to make such an order. But it also appears that a decree in partition had previously been made in this court adjudging the provisions of Augustus Henry's will, so far as it directs payment of Gustavus Adolphus Brake's share to Henry Schluter (the very person so appointed trustee and authorized to demand the share from the company) to be inoperative. Schluter was an alien and non-resident. The order in fact was void, and the trust company only did its duty in calling the matter to the attention of the court. The application was a barefaced attempt to evade the provisions of the partition decree, and to withdraw the fund from our jurisdiction. This must have been the view entertained by the learned justice who granted the original order, as soon as his attention was called to the real fact, for it appears that the vacation was after consultation with him, and, undoubtedly, with his full concurrence. The order should be affirmed, with costs.

DAVIS, P. J., and BRADY, J., concur.

Weyman agt. The National Broadway Bank.

N. Y. SUPERIOR COURT.

MARY F. WEYMAN agt. THE NATIONAL BROADWAY BANK and
MARY JENKINS.

Trials without a jury—Decision of court upon the trial of whole issue of fact—What decision must be made in order to authorize entry of judgment upon it—Code of Civil Procedure, section 1022.

A judge has no authority, on a written opinion delivered by a deceased judge, omitting to state separately the facts found and the conclusions of law, and not directing judgment to be entered thereupon, and which does not indicate the party to whom costs are awarded, to direct the entry of judgment upon it.

Special Term, August, 1880.

MOTION that the opinion of the late chief judge CURTIS, filed June 7, 1880, may stand as the findings of fact and conclusions of law, and that judgment be entered thereon.

John B. Whiting, for the motion.

John V. B. Lewis, opposed.

RUSSELL, J.—This action was tried before the late chief justice CURTIS, without a jury, on the 15th day of March, 1880. On the seventh day of June, judge CURTIS handed down an opinion, in which, after reciting the history of the controversy and discussing the law applicable to the questions at issue, he says: "The plaintiff is entitled to a judgment for the value of the property claimed. The evidence varies very much as to the value of this property. Giving it such consideration as I have been able to, from the proofs submitted, I find the value of the furniture claimed by the plaintiff, and disposed of by the bank, to be \$750."

On the back of the opinion, in the handwriting of judge

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CURTIS, are the words, "Judgment for the plaintiff; findings to be submitted on five days' notice. Opinion. W. E. C."

The proposed findings were prepared by counsel for the respective parties and were submitted on the nineteenth day of June; but before they were settled the lamented death of judge CURTIS occurred.

It is evident from these facts that at the time neither judge CURTIS nor the counsel regarded the opinion handed down as constituting such a decision of the court as is required by section 1022 of the Code.

While it is possible from that opinion to ascertain what, in general, were judge CURTIS' views upon the facts and the law of the case, the opinion does not state separately the facts found and the conclusions of law. It does not direct judgment to be entered thereupon, and does not indicate the party to whom costs are awarded. All these things a decision must do in order to authorize the entry of judgment upon it (*sec. 1022 of the Code*).

In *Thomas agt. Tanner* (14 *How. Pr.*, 426) it was expressly held that a judgment could not be entered on an opinion, but only on a decision as such (*and see Putnam agt. Crombie*, 34 *Barb.*, 232; *Mills agt. Thursby*, 12 *How. Pr.*, 113; *Van Slieck agt. Hyatt*, 46 *N. Y.*, 262; *Rogers agt. Beard*, 20 *How. Pr.*, 282; *Chamberlain agt. Dempsey*, 9 *Bosw.*, 212; *Loeschigk agt. Addison*, 3 *Robt.*, 331).

The question now arises whether this court has power to give to that opinion a character and force—judge CURTIS being dead—which it did not have when he was alive. Considering that the case was fully tried before judge CURTIS, and that after mature deliberation he found for the plaintiff, it is certainly unfortunate if judgment cannot now be entered in accordance with the conclusions to which he came.

It is a hardship to put the plaintiff to the delay, the expense and the worry of a second trial, if the court has power to relieve her from them. But while there are many provisions of law permitting proceedings begun before one officer to be

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continued, in case of his death or removal, before another, they are proceedings where the thing remaining to be done is either ministerial in character or a matter of course following what has already been done, and requiring the exercise of no judicial judgment.

No authority is shown by counsel, nor have I found any, to do what is here requested. The matter of decisions and entry of judgment is regulated by statute.

If the opinion could be regarded as a decision satisfying the requirements of section 1022, judgment could have been entered upon it, not only without this motion, but without the findings which were submitted. It wants not an order of the Court to make a decision, and to authorize the entry of judgment thereon (*section 1028 of the Code*). On the other hand, the order of this court cannot make that a decision which in fact is not one.

The plaintiff's motion is therefore denied, with costs, on the ground of want of power.

SUPREME COURT.

SMITH ELY, Jr., mayor of the city of New York and others,
agt. ALLAN CAMPBELL, commissioner of public works and
another.

Unauthorized obstructions on streets and sidewalks — Nuisance.

Streets which include sidewalks are for the use of the public at large.

Any obstruction erected on the streets or sidewalks without the sanction of the legislature is a nuisance.

A local municipal corporation cannot give a valid permission to any one to occupy the streets or sidewalks with continuing erections or other obstructions without express power conferred by statute.

The municipal legislature of the city of New York has no power to authorize the occupation of the streets and sidewalks, in the neighbor-

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hood of the markets, with stands and booths to be kept and maintained continuously at all hours of the day.

It is the duty of the commissioner of public works to remove all illegal obstructions placed upon the streets and sidewalks.

Special Term, August, 1879.

MOTION to continue an injunction.

Elliot Sanford and I. S. Lawrence, for plaintiff.

W. C. Whitney, corporation counsel, and Geo. R. Andrews, for defendants.

VAN VORST, J. — The principal matter to be decided upon this motion, which is one for the continuance of an injunction, is as to the right of the superintendent of markets to grant permits or licenses to persons to construct and maintain stands and booths upon the sidewalks of the streets adjacent to Washington market.

The papers before me show that several such stands occupy considerable portions of the sidewalk on the south side of Vesey street, both above and below Greenwich street, as, also, the sidewalks of Greenwich street, and are maintained by their occupants for the purposes of trade under permits from the clerk or superintendent of the markets.

These structures are obstructions on the sidewalks which it is the duty of the defendant, the commissioner of public works, to remove, unless they are lawfully there.

It is claimed on the behalf of the plaintiffs that, under the municipal ordinances, the clerk of the markets may lawfully grant permits to persons so to use the sidewalks.

Streets which include the sidewalks are for the public at large.

The legislature of the state, representing that public, has authority over all public ways and places. It may authorize acts to be done, or legalize obstructions upon them, which would otherwise be deemed a nuisance.

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The legislature instead of authorizing the act directly may allow it to be authorized by the municipal authority.

A building or other structure of a like nature erected upon a street without the sanction of the legislature is a nuisance, and the local corporate authority of a place cannot give a valid permission thus to occupy streets without express power to this end conferred on them by charter or statute (*Dillon on Municipal Corporations*, secs. 518-521, sec. 316).

In *Hoffman's Estates and Rights of the Corporation of New York* (pages 403, 404) the learned author refers to the case of *Allerton* agt. *Delevan*, decided in the supreme court in 1861, in regard to a stand near Washington market, in which it was said :

"The stall in question is in one of the public streets of the city. It is out of the power of the corporation, even by the most solemn act of which it is capable, to confer upon any one the legal right to it for a day."

And *St. John* agt. *The Mayor, &c., &c., of New York* (3 *Bos.*, 484) holds that the municipal corporation, although authorized to have and keep such and so many markets, at such and so many places within its corporate limits, as shall from time to time be established by the common council, cannot erect nor allow markets to be erected and occupied in the public streets of the city (*State* agt. *Laverack*, 34 *N. J.*, 201).

Any permanent or habitual obstruction of a street, without authority of law, may fairly be said to be a nuisance. The public is entitled to the full and free use of all the territory embraced within the limits of a street or highway, in its full length and breadth, and every individual has a right to travel over any part of the same (*Wood on Nuisances*, sec. 252).

It is scarcely necessary to add that these statements are qualified by the right in the legislature alone to authorize obstructions permanent or continuing, and do not exclude such interruptions in the use of the streets by the public as are necessitated by the erection and alteration of buildings fronting on the street, and the occupation of the same with materials for

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the purpose, and other necessary and temporary occasions. Every obstruction of a street or highway is not necessarily a nuisance, or objectionable; but if unreasonably continued, or without direct legal right, it becomes such (*Knox agt. The Mayor, &c.*, 55 *Barb.*, 404; *Davis agt. The Mayor, &c.*, 14 *N. Y.*, 506).

The latter case decides, in direct terms, that any unauthorized continued obstruction of a public highway or street is a public nuisance (*Lawrence agt. The Mayor, &c., of N. Y.*, 2 *Barb.*, 577). Reference is made by the learned counsel for the plaintiffs to the ancient charters of the city, as the foundation of a right in the municipal legislature thus to authorize the occupation of the streets in the vicinity of the markets.

An examination of these charters discloses no such right.

But whatever there is in these charters inconsistent with, or opposed to, subsequent legislation on this subject, must be considered as repealed (*Laws of 1873, chap. 335, sec. 119*).

It is also claimed that the municipal ordinances of 1866 confer such rights.

But, as already observed, no municipal ordinance or regulation inconsistent with the law of the state can give such right. These ordinances, among other things, declares that it shall be the duty of the clerks of the market to assign and set apart certain parts of the streets, at or near the said public markets, for the purposes of exposing for sale and selling garden produce, etc. (*Chap. 35, article 2, sec. 8; see, also, article 4, sec. 35*).

But these ordinances and regulations do not necessarily authorize the streets, or any part of them, to be occupied with stands or booths to be kept and continually maintained at all hours of the day. The act to reorganize the local government of the city of New York, passed April 30, 1873 (*chap. 335, sec. 17*), confers upon the municipal legislature the power to pass ordinances to regulate traffic and sales in the streets, highways, roads and public places, and to regulate the use of sidewalks (*Subs. 1 and 2*).

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But subdivision 4 also empowers the aldermen to prevent encroachments upon and obstructions to the streets, &c., and to authorize and empower the commissioner of public works to remove the same, but it adds these emphatic words :

“ They shall have no power to authorize the placing or continuing of any encroachment or obstruction upon any street or sidewalk, except the temporary occupation thereof during the erection or repair of a building, on a lot opposite to the same.” With this exception the legislature has reserved to itself all power over the subject.

I regard this expression of the legislature as clearly against any right in the municipal board, or any of its officers or agents, to authorize the occupation of the streets and sidewalks with obstructions and encroachments of the character of those disclosed in this action. If the ordinances of 1866 allowed such encroachments and erections, they were *ultra vires*, and in any event are rendered nugatory by the act of the legislature above mentioned.

It is true that the ordinances “ *in force* ” in 1870 were revived and continued in force by section 119 of the act of 1873, but in view of the express prohibitions against the exercise of any powers to authorize encroachments and obstructions to the streets, except for the purposes mentioned, they cannot be interposed as a justification for the continuance of the obstructions and encroachments through the stands and booths in question.

Section 70 of the act of 1873 declares that “ it shall be the duty of the commissioner of public works to remove all obstructions now existing, or which may hereafter be placed upon any street or sidewalk.” And subdivision 8 of section 71 created in the “ department of works ” a bureau for the removal of incumbrances on the streets or sidewalks, the chief officer of which shall be called the superintendent of incumbrances, to whom all complaints shall be made and by whom such incumbrances shall be removed.

The papers show that complaints have been made to this

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bureau in the department of works of the erections in question as obstructions.

The sidewalks on Vesey street are not wide. Some of these stands are from six to eight feet in length and occupy some two feet of the sidewalk, and extend over the curbs and encroach upon the carriageway, in some instances, from two to four feet. Others are located at the corners of the streets, interfering not only with travel on the sidewalks, but impeding the movements of vehicles.

They occupy these positions at all hours of the day, and are used for the vending of meats, poultry and other articles.

The above facts appear by the affidavits of the superintendent of the bureau, in the department of works having oversight of incumbrances, and others, as, also, complaints proceeding from storekeepers on the street, ready access to whose places of business is hindered, and from persons traveling over the sidewalk and carriageway and others who are obstructed.

It is made the duty of the commissioner of works to remove these obstructions, and this, notwithstanding the fact that he has not been requested by the board of aldermen to take such action.

It is true, as appears above, that it is made a duty of the board of aldermen to order the removal of obstructions from the sidewalks and streets; but its omission to do so should not paralyze the action of the commissioner. He has a duty independent of the aldermen in this regard.

The commissioners of the sinking fund claim that the removal of these stands and booths from the streets will deprive them of revenues which they are entitled to receive and apply to the payment of the city debt.

By chapter 9, article 1, subdivision 8 of the ordinances of 1866, the proceeds "for market fees and market rents" are pledged to the sinking fund.

The market fees and rents, properly so-called, are not interfered with by the proposed action of the commissioner of public works.

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It cannot be said to be an impairment of these revenues if the rents which are sought to be collected for the use of stands and booths on the public streets, which the municipal board has no legal right to authorize, are cut off.

The motion for the continuance of the injunction should be denied.

N. Y. COMMON PLEAS.

A. PERSON, HARRIMAN & Co. agt. REBOE M. OBERTEUFFER.

Equitable liens — what necessary to the existence of.

An agreement was entered into in 1875 between the plaintiffs and the firm of A. Soleliac & Sons whereby the former agreed to furnish said firm with raw materials for the manufacture of silk goods, and to advance funds for the purchase thereof; which goods, when manufactured, were to be delivered to and sold by the plaintiffs, the balance of the proceeds of each sale, after deductions for commissions, insurance and advances made, to be paid to said firm. During the years 1875 to 1877, the plaintiffs advanced large sums of money to them, and the latter in turn manufactured silk and consigned the same to plaintiffs for sale. On the 8th of September, 1877, Soleliac & Sons failed, and made a general assignment to the defendant. The latter took possession of all the stock and machinery of the debtors; among these were nineteen pieces of silk finished, and about forty-five pieces unfinished. The plaintiffs claimed to have an equitable lien thereon for the balance due them from Soleliac & Sons, which amounted to \$10,000, and thereupon brought this action to enforce the same:

Held, that the plaintiffs were not entitled to recover. The identical property or its proceeds must be traced in order to uphold the lien.

Assuming that a valid trust was created and a lien thereby acquired, it confers a right of recovery of the subject-matter of the trust or its proceeds only; and such trust cannot be impressed upon the funds in the hands of the defendant who is general assignee for the benefit of creditors.

Special Term, June, 1880.

Person, Harriman & Co. agt. Oberteuffer.

SOLELIAC & SONS were large ribbon and silk manufacturers at Paterson, New Jersey. During the years 1875 to 1877, the plaintiffs advanced large sums of money to them, and the latter in turn manufactured silk and consigned the same to plaintiffs for sale. On the 8th of September, 1877, Soleliac & Sons failed, and made a general assignment to the defendant, a member of the firm of Oberteuffer, Abegg & Co. The latter took possession of all the stock and machinery of the debtors. Among these were nineteen pieces of silk finished, and about forty-five pieces unfinished. The plaintiffs claimed to have an equitable lien thereon for the balance due them from Soleliac & Sons, which amounted to \$10,000, and thereupon brought this action to enforce the same.

Issues were framed and tried before judge VAN BRUNT and a jury, who found that Soleliac & Sons had agreed to use the money received from the plaintiffs in the manufacture and consignment to plaintiffs of finished silk.

On the trial of the other questions before judge LARREMORE, judgment was rendered for the defendant, and the following opinion given :

Kobbe & Fowler and Stephen Fullerton for plaintiffs.

A. Blumensteil, for defendant.

LARREMORE, J. — After a careful examination of the testimony and the elaborate briefs submitted by the respective counsel, my conviction still remains that the plaintiffs are not entitled to recover in this action.

They seek to establish an equitable lien upon property and trust funds held by the defendant as assignee of A. Soleliac & Sons, under a general assignment for the benefit of creditors made September 8, 1877.

The claim thus sought to be enforced rests upon an agreement made in the year 1875 between the plaintiffs and the firm of A. Soleliac & Sons, whereby the former agreed to fur-

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nish said firm with raw materials for the manufacture of silk goods, and to advance funds for the purchase thereof; which goods, when manufactured, were to be delivered to, and sold by, the plaintiffs, the balance of the proceeds of each sale, after deduction for commission, insurance and advances made, to be paid to said firm.

Issues were framed and submitted to a jury, which found that between May 3, 1875, and September 1877, plaintiffs, in pursuance of such agreement, furnished to said firm raw materials and money to purchase the same to the amount of \$150,000.

That after July 24, 1877, various advances were thus made, amounting, in the aggregate, to \$10,470, and that said firm agreed to hold the property manufactured, or in process of manufacture, and the moneys advanced for the benefit of the plaintiffs and as a security and pledge for the performance of said agreement.

Assuming that a valid trust was created by the agreement between the parties thereto, it remains to be seen whether, upon the testimony of this case, such trust can be impressed upon the funds in the hands of a general assignee for the benefit of creditors.

It will be observed that there was a running agreement between the parties thereto, involving several demands, supplies, sales and settlements of advances and materials. This is apparent on the face of the agreement, and from the policies of insurance for which it provides.

The doctrine of equitable lien has been so fully discussed that a mere reference to leading authorities on the subject will suffice in the decision of this case. Assuming, as above stated, that a valid trust was created, and a lien thereby acquired, what is its scope and limit? Obviously it confers a right of the recovery of the subject-matter of the trust or its proceeds (*Grinnel* agt. *Suydam*, 3 *Sand.*, 135; *Gilsin* agt. *Stone*, 43 *Barb.*, 291; *Story's Equity*, sec. 964).

All the cases point to one conclusion — that the identical

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property or its proceeds must be traced in order to uphold the lien (*Story's Equity*, sec. 1218; *Perry on Trusts*, sec. 82; *Flaggerty v. Palmer*, 6 Johns. Ch., 437; *Arnold agt. Morris*, 7 Daly, 498).

In this particular the evidence offered on the part of the plaintiffs fails to substantiate their claim to the equitable relief which they seek. Nor is their case strengthened by the recitals in the policy of insurance. The latter appear to have been (as termed in agreement) "floating policies," covering any goods that were delivered to Soleliac & Sons, and unless a loss occurred which their provisions covered, created no specific lien which the plaintiffs could enforce.

• Whatever rights the plaintiffs have against the firm of Soleliac & Sons for conversion or misappropriation of property, breach of contract or otherwise, are not here at issue, and cannot be determined on this trial.

The defendants are entitled to judgment in their favor for a dismissal of the complaint, with costs.

SUPREME COURT.

UNION DIME SAVINGS INSTITUTION agt. FRANCIS J. CLARK and others.

Mortgage foreclosure — Motion to open default and set up defense of usury — Laches.

A second mortgagee may defend against a prior, usurious mortgage. The defense of usury is legal and is to be treated as any other defense. Where a second mortgagee suffered a default in the foreclosure of a first mortgage, being ignorant of the fact that the first mortgage was usurious :

Held, that upon this fact first coming to the knowledge of the second mortgagee, upon a trial between the holder of the first mortgage and the owner of the equity of redemption, the default should be opened and the defense of usury allowed to be set up by the second mortgagee.

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Held, further, that the second mortgagee had not lost this right by laches. It is an essential element of laches or negligence that the party charged with it should have knowledge, or have failed or omitted to obtain knowledge where it was obtainable, after notice, or circumstances which should have induced an inquiry and an effort to obtain knowledge.

Special Term, August, 1880.

THIS is a motion in a foreclosure suit on behalf of defendant Joseph Moore, the holder of a second mortgage, to open a default, and for leave to answer and set up the defense of usury.

G. M. Thompson, for the motion.

William H. Arnoux, opposed.

POTTER, *J.* — This is a motion to open a default in a suit to foreclose by a prior mortgagee, and suffered by a second mortgagee. The excuse for suffering a default, was ignorance of the fact of usury in the first mortgage, and that this fact was first learned by this second mortgagee upon a trial between the holder of the first mortgage and the owner of the equity of redemption. The court, at general term, in this case held that the answer interposed by the owner of the equity of redemption substantially alleged usury, and that the defendant owner of the equity should be allowed to press it. The law is well settled, in this state, that the second mortgagee may defend against a prior usurious mortgage (*Berden agt. Sedgewick*, 40 *Barb.*, 359; and see note upon *Peutren agt. Mitchell*, 22 *Am. Rep.*, 287). Has the defendant, Moore, lost this right by laches? The defendants showed, and there is no contradiction of them, that at this time of suffering the default, and until a trial was had, long subsequent, the defendant, Moore, did not know of the usury. It is generally an essential element of laches or negligence that the party charged with it should have had knowledge, or have failed or omitted to obtain knowledge where it was obtainable, after notice, or cir-

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cumstances which should have induced an inquiry and an effort to obtain knowledge. No notice or hint to the defendant, Moore, that the first mortgage was usurious is alleged or pretended. He must have presumed that the first mortgage was what it purported to be on its face, and that the parties to it had not been guilty of violating the law or committing a misdemeanor. The court, at general term, has but re-announced the rule that the defense of usury is legal, and to be treated as any other legal defense. Would the court refuse to open a default under these circumstances to let in any other defense? If not, the application in this case should not be refused because the defense is usury. Allowing a defendant to interpose a defense cannot delay the action, as the question of usury has got to be tried as to these other defendants. Besides, if the plaintiff's mortgage is invalid against the purchaser of the mortgaged property, and that is established, how will the plaintiff suffer any harm by allowing the defendant, Moore, to maintain the same issue? If the plaintiff cannot foreclose and sell the premises under his mortgage by reason of usury, of what avail can it be to him that he should hold a judgment preventing Moore from redeeming premises which the plaintiff does not have a lien upon, and cannot acquire under a decree of foreclosure and sale against the owner of the premises? The motion should be granted.

SUPREME COURT.

LOUIS E. HOWARD *et al.* agt. JOSEPH PARK, Jr., *et al.*

Reference — To assess damages upon injunction — when should not be granted.

A reference to assess damages upon injunction should not be granted, after appeal from the judgment is perfected, until final decision upon the appeal.

First Department, General Term, July, 1880.

Brown agt. Zeiss.

Before DAVIS, P. J., BRADY and BARRETT, JJ.

APPEAL from order of reference to assess damages.

Fred. K. W. Hinrichs, for appellants.

Stephen A. Walker, for respondents.

PER CURIAM. — The case is within the principle of *Musgrave* agt. *Sherwood* (76 N. Y., 194). Prior to the time when the reference to assess damages was granted, the appeal from the judgment had been duly perfected, consequently, under the decision cited, the motion for such reference should have been dismissed. The order should be reversed, with ten dollars costs and disbursements of the appeal, and the motion for a reference to assess damages upon the injunction dismissed without costs, and without prejudice to a renewal upon the final decision of the case upon appeal.

N. Y. COMMON PLEAS.

WALTER M. BROWN agt. KATHERINA W. ZEISS and J. D. KURTZ CROOK, as administrators of the goods, chattels and credits of GEORGE H. ZEISS, deceased, and others.

Mechanic's lien — When it attaches — Necessary parties to foreclosure — Complaint — Demurrer.

Plaintiff furnished G. H. Z. certain lumber which he purchased for the purpose of building fences and other structures in his coal yard on Avenue D, in the city of New York. G. H. Z. agreed to pay cash for the lumber, but after all the lumber was furnished and used for the purpose intended, but before it was all paid for, G. H. Z. died, intestate, and the defendants, K. W. Z. and J. D. K. C., were appointed administrators. Thereafter, and before the expiration of thirty days from the time of the furnishing of the lumber, the plaintiff filed a notice of

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claim or mechanic's lien, and thereafter commenced an action to foreclose the same. The defendants demurred to the complaint on the ground that it did not show a sufficient cause of action, G. H. Z. having died before the lien was filed :

Held, that the lien had attached before the death of the owner, and the estate subject to the lien, and estate for years, passed to the administrators of the owner as part of the assets of the intestate. The administrators are liable for the deficiency, if any there should be, and the other defendants, who purchased the estate subject to the lien, are necessary parties to the foreclosure.

Special Term, February, 1880.

THE plaintiff furnished the late George H. Zeiss certain lumber, which said George H. Zeiss purchased for the purpose of building fences and other structures in his coal yard on Avenue D, in the city of New York. George H. Zeiss, agreed to pay cash for the lumber, but after all the lumber was furnished and used for the purpose intended, but before it was all paid for, Mr. Zeiss died intestate, and the defendants, Katherina W. Zeiss and J. D. Kurtz Crook, were appointed administrators by the surrogate of the county of Kings. Thereafter, and before the expiration of thirty days from the time of the furnishing of the lumber before mentioned, the plaintiff filed a notice of claim or mechanic's lien in the clerk's office of the city and county of New York, and thereafter commenced an action to foreclose the same. The defendants demurred to the complaint on the ground that the complaint did not show a sufficient cause of action, Mr. Zeiss having died before the lien was filed.

John L. Brower, for plaintiff.

Bell, Bartlett & Wilson and *H. W. Hayden*, for defendants.

VAN HOESSEN, J.—In the case of *Barnes* agt. *Swanson* (4 *Best & S.*, 270) Mr. justice COMPTON said: "When you get to these acts of parliament the difficulty is immense;" and in *Stratton* agt. *Petitt* (16 *C. B.*, 432), Mr. justice MAULE

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said, in referring to an act of parliament: "Its absurdities are so great that the framers themselves had no very distinct notion of its meaning." The same observations might with propriety be made respecting the mechanics' lien act of 1875. There have been a number of acts on the subject of mechanics' liens, and there was no reason for leaving the courts to guess at what the legislature meant.

In the statute before me the lien act of 1863 bound the land from the time the work was begun, notwithstanding any sale, transfer or incumbrance made thereafter, but the amendment of 1866 so changed the law that the mechanics acquired a lien upon that interest only which the owner had in the land at the time the mechanics' claim was filed in the office of the county clerk. The act of 1875, drawn long after the statutes of 1863 and 1866, ought to have left no room for doubt as to the extent of the lien; but yet we find section 3 and section 7 open to different constructions, by one of which the land is bound from the beginning of the work, and by the other of which the land will not be bound at all if the owner conveys it before the mechanic files his claim. Section 4 regulates the order of priority of liens. It provides that any mortgage, or any other incumbrance, not recorded, and not known to the mechanic, shall be postponed to the claim of the mechanic; but an incumbrance, if on record at the time the mechanic's claim is filed, shall be a lien on the land superior to the mechanic's lien. The priority of liens, therefore, is determined by the dates at which they become matters of public record. Section 3 provides that if, at the time the work is begun, or the furnishing of materials is begun, the person who causes the structure to be erected owns the fee, the land shall be subject to the lien; but that if such person owns an estate less than the absolute fee simple, then his estate, whatsoever that may be, shall be subject to the lien. "Subject to the lien" means bound by the lien. The land would not be bound by or subject to the lien, if the owner could sell it free from the lien.

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Under the act of 1875 a lien does not owe its existence to the filing of the claim. That act does not provide, as did the earlier statutes, that on filing his claim or giving notice the mechanic should have a lien, but it declares that the land, or the estate in the land of the person who causes the work to be done or the materials to be furnished, shall be subject to a lien in favor of the persons doing such work and furnishing such materials.

If the mechanic or the material man fails to perform his contract, so that the land owner owes him nothing, of course there is no lien ; but when the contract is performed the right to the lien is complete, though that right may be lost if it be not asserted by the filing of a claim within the period prescribed by statute, and though the land owner cannot be compelled to pay more than the amount which at the time of the filing of the claim he owes the original contractors.

It is true that no very good reason can be perceived for permitting the land owner to mortgage whilst withholding from him the right to sell, and that the mechanic may lose his entire claim if a mortgage or a judgment becomes a matter of record before his claim is filed ; but these are matters which address themselves to the legislature and not to the courts. Construing section 3 in connection with section 1, I think the meaning of the legislature was to bind the land so that after the work begins, or the delivery of materials begins, the land owner cannot convey the land free from the inchoate lien. Section 7 is not at first blush in all respects consistent with the construction. It provides that, except as provided in the fourth section, the lien shall attach, to the extent of the liability of the owner to the contractor, to all the right, title and interest which the owner has in the property at the time the lienor files his claim. Section 4, it will be remembered, provides that any lien, mortgage or incumbrance recorded before the claim is filed shall have priority to the mechanic's lien, whilst the language of section 7 is ambiguous. I am inclined to the opinion that the meaning is, as I have before said, that

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if an incumbrance of any kind is placed upon record after the work has begun and before the claim is filed, the lien shall attach on such interest only as the owner has in the land at the time of the filing of the claim. To all the right, title and interest which the owner then has "must, it seems to me, mean that if the interest of the owner in the land is diminished by the recording of incumbrances after the work is begun, the lien of the mechanic shall be subordinate to those incumbrances and shall bind only that interest which, after the recording of the incumbrances, remains in the owner." The interest which the owner then has must be the same interest which he had when the work was begun, unless an incumbrance has meantime been recorded. If the land be "subject to the lien" the interest of the owner can only be changed to the extent permitted by the statute; and, as has been already said, that change may be effected by the recording of an incumbrance, but cannot be by the recording or the making of a sale or transfer.

If this be unreasonable or absurd, the fault is with the legislature, not with the courts.

If the foregoing views are correct the demurrer must be overruled. The lien had attached before the death of the owner, and the estate subject to the lien, and estate for years, passed to the administrators of the owner as part of the assets of the intestate. The administrators are liable for the deficiency, if any there should be, and the other defendants who purchased the estate subject to the lien are necessary parties to the foreclosure. The demurrers must be overruled with leave to the defendants to answer on payment of costs.

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SUPREME COURT.

WILLIAM G. WILSON, appellant, agt. WILLIAM H. GRANT,
respondent.

Stay of proceedings upon judgment of foreclosure, pending appeal to general term, discretionary — Plaintiff not entitled as matter of right to a deficiency undertaking

A stay of proceedings upon judgment of foreclosure, pending appeal to the general term, is discretionary and plaintiff is not entitled as matter of right to a deficiency undertaking. Where the foreclosure is upon leasehold premises, and "there is a receivership for application of the rents, the discretion granting a stay was fairly exercised.

First Department, General Term, July, 1880.

APPEAL from order staying proceedings upon a judgment of foreclosure and sale. The mortgage was upon leasehold premises.

William G. Wilson, plaintiff in person.

Mitchell & Mitchell, for respondent.

BARRETT, J. — The order appealed from was as favorable to the plaintiff as could reasonably have been expected. All that he could gain by a sale would be the value of the lease under present circumstances; that was substantially secured to him by the order appropriating the entire rents. The stay was discretionary under section 1351 of the Code of Civil Procedure, and we think the discretion was fairly exercised. The plaintiff was not entitled, as matter of right, to the undertaking for deficiency required by section 1351; that only applies to an appeal to the court of appeals. On an appeal to the general term the court may grant a stay upon such terms, as to security or otherwise, as justice requires. It is only when security is exacted as a condition of such stay that the provisions of section 1351 are applicable. Here the

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receivership, though not in form, was, in substance, imposed as a condition of granting the stay. We think the plaintiff could not justly complain of that part of the order appealed from, it being to his benefit and giving him all the security he was entitled to, namely, the impounding and application of the rents. The order should, therefore, be affirmed, with costs.

DAVIS, P. J., and BRADY, J., concur.

SUPREME COURT.

FAIRCHILD agt. FAIRCHILD.

Misdescription of real property — Purchaser relieved — Judicial sale.

A purchaser at a judicial sale will be relieved from the completion of his purchase and his deposits will be restored, where it appears that the contract was one which he never intended to make, and which he entered into without any fault or negligence on his part.

Where it appears that the contract to purchase was made in the full belief upon the part of the purchaser, and that such belief was just and reasonable; that the lots fronted and cornered upon Ninth avenue and Two Hundred and Fifteenth street, when in fact the lots did not so front and corner, but the front or east line of said lots is 225 feet from Ninth avenue, as laid down upon the official map, and that the value of said lots is one-third less in consequence of their location with reference to Ninth avenue:

Held, that the purchaser should be relieved from the performance of his contract.

At Chambers, August, 1880.

MOTION by Bernard Tillman, a purchaser at a partition sale, to be relieved from the completion of his purchase and to have his deposits restored.

Meyer S. Isaacs, for purchaser.

Edward C. James, for plaintiff.

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POTTER, J. — Two or three grounds for the relief asked for are presented by the affidavits of the purchaser and his attorney. The first and principal ground is, that on the occasion of the sale, which was at public auction, the auctioneer represented, and a map was used showing, that all the lots purchased fronted on Ninth avenue, in the city of New York, and that one of them — to wit, lot No. 37 — was a corner lot, formed by the intersection of Two Hundred and Fifteenth street and Ninth avenue. The notice of sale mentioned these lots as four lots on the south-west corner of Ninth avenue and Two Hundred and Fifteenth street; and the lots are described in the judgment as lying upon the Ninth avenue; that he bid for said lots upon the belief that said lots so fronted and cornered; but that the fact is that these lots did not so front and corner, but the front or east line of said lots is 225 feet from Ninth avenue, as laid down upon the official map; and that the value of the lots is one-third less in consequence of their location with reference to Ninth avenue. It does not appear from the moving affidavits when the purchaser learned the lots did not front on Ninth avenue, nor that the said official map locating Ninth avenue had been made or changed since the purchase. There are no affidavits presented by the defendant. Doubtless one would have been presented showing the location by the city of Ninth avenue to have been made since the purchase, if such had been the fact. I think, therefore, it should be assumed upon this motion that Ninth avenue was located 221 feet from the site of these lots at the time of the sale. I am constrained to the conclusion that the contract to purchase was made in the full belief upon the part of the purchaser, and that such belief was just and reasonable, that the lots fronted and cornered upon Ninth avenue and Two Hundred and Fifteenth street. The conclusion is as plain as it is just that the purchaser should be relieved from the performance of a contract which he never intended to make, and which he entered into without any fault or negligence on his part.

Hardt *et al.* agt. Schulting.

SUPREME COURT.

JOHN H. HARDT *et al.*, appellants, agt. HERMAN SCHULTING,
respondent.

Practice — Justification of sureties on appeal — Effect of adjournment out of court.

Where justification of sureties on appeal to the court of appeals has been inadvertently adjourned "out of court," the appellant has no such "fixed right" to sue on the undertaking to the general term as prevents the court from directing the new bond to be filed *nunc pro tunc*.

First Department, General Term, July, 1880.

APPEAL from an order granting leave to file a bond on appeal to the court of appeals from the judgment of this court, *nunc pro tunc*.

William Watson, for appellants.

C. B. Smith, for respondents.

DAVIS, *P. J.*—The point whether the order appealed from recites the papers used on the motion seems to have been disposed of on the motion for resettlement of such order. The court below held substantially that the papers asked to be inserted were not used on this motion. It would be indecorous for us to hold the contrary on conflicting evidence; for the question is one which in such controversies is always submitted to the decision of the court below. We think the court had power to allow the bond to be filed *nunc pro tunc* under the circumstances, notwithstanding a new bond could have been filed under the provisions of the present Code. The sureties in the first bond had failed to appear and justify. On objection of appellant's counsel, the justice held that the justification had been inadvertently adjourned "out of court"

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by him. It was in his discretion whether he would relieve the respondent by allowing a new bond to be filed *nunc pro tunc*. If the adjournment did not put the proceedings to justify "out of court," the failure of one surety to justify would have entitled the respondent to have substituted a surety who could justify. That was the practical effect of what was done. The appellant had no such "fixed right" to sue on the undertaking on appeal to this court as prevented the court from exercising its discretionary power to direct the new bond to be filed *nunc pro tunc*. It might properly do it for the express purpose of arresting an unnecessary litigation. There was no abuse of discretion, and we think the order should be affirmed, with ten dollars costs and disbursements.

BRADY and BARRETT, JJ., concur.

SUPREME COURT.

JOHNSON BROS. & Co. and others agt. BERNARD REILLY,
sheriff, &c.

*Practice — Sheriff — Executions — Action against sheriff for false return —
Answer — Mere issuing of prior executions no defense.*

In an action against a sheriff to recover for alleged false returns of several executions, the mere issuing of a prior execution is no defense in itself; nor can the sheriff stultify his own return so as to justify under another execution which he has also returned unsatisfied.

It matters not how many executions the sheriff may have had, unless there is some averment showing that they affected the plaintiffs' execution.

Special Term, July, 1880.

JOHNSON BROS. & Co., Bates, Reed & Cooley, Lee, Tweedy & Co., and several other judgment creditors of the late firm of Rogers & Orr Bros., brought actions last spring against ex-sheriff Reilly to recover, in the aggregate, about \$25,000 for alleged false returns of the several executions issued by

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them and levied upon the store of the judgment debtors, Nos. 183, 185 and 187 Eighth avenue.

Executions in favor of H. B. Claffin & Co., aggregating \$55,000, were previously levied on the same property. The sheriff returned the first execution of \$31,000 satisfied to the extent of \$28,000, and unsatisfied for the balance. In actions Nos. 2 and 3 *nulla bona* was returned as well as on all subsequent executions.

The plaintiffs in the sheriff's suits now claim that the goods levied upon were worth \$85,000, and were never disposed of in a legal manner by the sheriff, a large portion having been sold at retail without the knowledge or consent of junior execution creditors, and the balance at private auction sale, without notice, &c., and that as to subsequent execution creditors there never was a sale, and the property, or its value, was applicable to their several executions.

The sheriff, in the original answer, simply interposed the usual answer, in substance, putting in issue the allegation of property of the defendants applicable to the plaintiff's executions. In an amended answer they set up, in paragraphs 5, &c., the issuing of the prior executions Nos. 2 and 3 in the Claffin judgments, copies of which were attached as schedules. The defendant then moved to strike out this portion of the amended answer as irrelevant and immaterial on the ground that the mere issuing of a prior execution was no defense in itself, and that the sheriff cannot stultify his own return so as to justify under another execution which he has also returned unsatisfied, citing *Paton* agt. *Westervelt* (2 *Duer*, 362, 389), and *Torone* agt. *Crowder* (2 *Car. & P.*, 356).

S. F. Kneeland, for plaintiffs.

Vanderpoel, Green & Cuming, for defendants.

WESTBROOK, J. — The fifth and sixth claims, with the schedule attached, should be stricken out because they con-

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tain, as they stand, neither in themselves or in any facts averred in the first defense, any defense. It is nowhere averred in that part of the answer that the executions in favor of Claflin & Co. were ever levied upon the property of the defendants during their life (*Smith* agt. *Smith*, 60 *N. Y.*, 161), or that they could have been, or that the property was exhausted by a sale thereof under such executions, or that the property was not ample to satisfy their execution as well as that of plaintiffs. It matters not how many other executions the defendants may have had, unless there is some averment showing that they affected the plaintiff's execution.

Motion granted, with ten dollars costs.

SUPREME COURT.

SILAS C. CROFT and others agt. ORLO W. RICHARDSON and others.

Rights of rival patentees in publishing their claims—Jurisdiction of state courts to restrain the publication by one patentee of malicious libels concerning another's business, who is selling a similar article of manufacture.

It is legal and proper for parties claiming rights under letters patent to publish the rights claimed by them, and to give notice and warning of prosecutions of all parties who violate the rights secured by such patent, if done in good faith, and the courts will not restrain publication and circulation of that character.

But where, as in this case, the publication substantially charges that plaintiffs are prosecuting a business which is an unlawful interference with the defendants' rights, and are irresponsible and hoping to make something out of it before legal proceedings are taken, and that their efforts in that direction are nefarious:

Held, that this language is quite too excessive to convey simply information that plaintiffs and their patrons have no right to make and sell the article of which they claim to be the patentees, and are liable to defendants for so claiming, and the state courts have the right and jurisdiction to restrain such publication.

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THIS suit is brought to recover damages on account of alleged false and malicious statements, threats and warnings of defendants to customers of plaintiffs and parties dealing or about to deal with them, and for an injunction to restrain defendants from further interference with the business of plaintiffs. The defendants say that one of them patented an invention, for the use of which the other defendants pay a royalty; that one of the plaintiffs, who had been in the employ of one of the licensees, after having been discharged, combined with the other plaintiffs, and commenced to manufacture and sell the invention in competition with the business of defendants, in disregard and violation of the patent, and the publication complained of was to protect the rights and business of the licensees from this alleged unlawful and unjust encroachment; and the giving the information they did, under the circumstances, was not only their right but their duty. The case came before supreme court, chambers, upon a motion to restrain the defendants from publishing and distributing two circulars. The plaintiffs have a patent for an "exhibitor" granted in 1879, and defendants' patent for the same article is dated in 1875. The circulars represent that plaintiffs and other irresponsible parties are sending out circulars "trusting to make a considerable profit before legal proceedings put a stop to their nefarious efforts."

POTTER, J.—"Will the law permit the continuation of such publication? It is legal and proper for parties, claiming rights under letters patent, to publish the rights claimed by them, and to give notice and warning of prosecution of all parties who violate the rights secured by such patent, if done in good faith, and the courts will not restrain publication and circulation of that character (*Hovey agt. Rubber Co.*, 57 N. Y., 119). In this case the plaintiffs claim the right to dispose of a carpet exhibitor under the patent granted to Peterson, but do not deny the existence or validity of the patent granted to defendant Richardson, or the defendants' rights

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thereunder to make and dispose of the same. The defendants, however, do deny the validity of plaintiffs' patent, and the rights under the same claimed and exercised by plaintiffs. This court has no jurisdiction to try and determine disputed rights and claims under patents granted by the United States government. But that is not the real question involved in this controversy between these parties. The plaintiffs, while not denying defendants' rights under the Richardson patent, claim that they have rights under the Peterson patent, and that they are lawfully engaged in the business of making, selling and leasing exhibitors under their patent, and that the defendants are publishing false and malicious libels concerning the plaintiffs' business, and their business character and transactions. This the state courts have the right and jurisdiction to restrain (*Snow agt. Milson*, 38 Barb., 210; *Thorley agt. Massam*, a case in the English chancery division, and published in the *Albany Law Journal*, vol. 21, page 171). The circulars issued and distributed among the parties dealing with the plaintiffs go beyond making the claim that plaintiffs are infringing upon the rights of the defendants and giving notice of such infringement and its legal consequences. They substantially charge the plaintiffs are prosecuting a business which is an unlawful interference with the defendants' rights and are irresponsible and hoping to make something out of it before legal proceedings are taken, and that their efforts in that direction are nefarious. This language is quite too excessive and ill chosen to convey simply information that plaintiffs and their patrons have no right to make and sell exhibitors, and are liable to defendants for so claiming. At all events, I think it quite safe to hold that such language is satisfactory evidence of malice until the defendants commence an action in good faith, against the plaintiffs or other parties, to vindicate the rights which the defendants claim."

Motion granted.

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SUPREME COURT.

In the matter of the application of WILLIAM H. MUNDY for a warrant against RICHARD J. MORRISON, PHILIP MERKLE and GEORGE W. MORTON.

The authority of commissioners of excise of the city of New York to grant ale and beer licenses.

The laws of this state permit the granting, in the city of New York, of an ale and beer license authorizing its sale; to be drank on the premises, when the party selling is not licensed as a hotel keeper. Such licenses are in the discretion of the board of excise.

New York Chambers, June, 1880.

William H. Mundy, for application.

Menzo Diefendorf, opposed.

WESTBROOK, J. — Application was made to me as a judge, whilst holding court in New York city, to issue a warrant against the above-named parties, who are excise commissioners of the said city of New York, upon a complaint charging them with having illegally and contrary to law granted to John Knell, of 95 Maiden lane, in said city, “a license to sell ale and beer in quantities less than five gallons at a time, to be drank on the premises where sold, the said John Knell not being an inn, tavern or hotel keeper.”

The point upon which the charge depends is: Do the laws of this state permit the granting in the city of New York of an ale and beer license authorizing its sale, to be drank on the premises, when the party selling is not licensed as a hotel keeper? In other words, can the excise board of the city authorize ale or beer to be sold and drank on the premises of the seller without granting to him a hotel license?

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The complaint involves a pure question of law depending on the construction of statutes, which must be decided upon the laws as they are without any regard to my own notion of what they ought to be.

By the act of 1857, as originally passed, entitled "An act to suppress intemperance and to regulate the sale of intoxicating liquors," and the sixth section thereof, no such license could be granted.

By chapter 856 of the Laws of 1869, however, which both its title and provisions show was amendatory of the act of 1857, and by its fourth section it is provided: "All the provisions of this act as amended shall be held to apply to the sale of ale or beer, except so much thereof as forbids the granting of license to any person, except to such persons as propose to keep an inn, tavern or hotel; and the commissioners of excise may, in their discretion, grant license for the sale of ale or beer, for a sum not less than ten dollars, to other than those who propose to keep an inn, tavern or hotel; and the provisions of this act shall extend to all portions of the state except the Metropolitan police district."

The reason of the exception of the Metropolitan police district from the provisions of the act of 1869 was this: By chapter 578 of the Laws of 1866, a separate act existed therefor, excepting the county of Westchester, which authorized a license within such district "to any person or persons of good moral character, and who shall be approved by them, permitting him and them, for one year from the time the same shall be granted, to sell and dispose of at any one named place within said Metropolitan police district, exclusive of the county of Westchester, strong and spirituous liquors, wines, ale and beer, in quantities less than five gallons at a time, upon receiving a license fee to be fixed in their discretion, and which shall not be less than thirty nor more than two hundred and fifty dollars." That act allowed licenses to "sell strong and spirituous liquors, wines, ales and beer in quantities less than five gallons at a time," to be granted without

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the issuing of one to keep a hotel, to any person within the district to which such act referred (*People agt. Smith*, 69 *N. Y.*, 175; *see page 179*).

To return, however, from this digression to the act of 1857, and the amendments of 1869. By a well-known rule of law, the amendments made by the latter to the former became and were, from the date of the enactment, parts of the original act, so that when the act of 1857 is thereafter referred to, unless there be some words used indicating the contrary, the act as amended is intended, as much so as when a reference is made to a physical object, which at the time of such reference is in a changed or altered form, the object as so changed or altered is thereby designated (*Dexter & Limerick Plank Road Company agt. Allen*, 16 *Barbour*, 15; *see pages 16-17*). This doctrine is well illustrated in the quaint language of an old case (*Bayly agt. Murin*, 1 *Ventris' Reports*, 246), cited with approbation in *Potter's Dwarries on Statutes* (*page 190*): "Because the 14th *Eliz.* is a kind of appendix to the 13th of *Eliz.*, and does not repeal it, but *sub modo* a little enlarging it as to houses in market towns; wherefore the 18th of *Eliz.*, reciting the 13th does by consequence recite the 14th also."

By section 6 of chapter 175 of the Laws of 1870, the separate act (*chapter 578, Laws of 1866*) in regard to the Metropolitan police district was repealed "and the provisions of the act passed April sixteenth, eighteen hundred and fifty-seven" (*i. e.*, the act entitled "an act to suppress intemperance and to regulate the sale of intoxicating liquors," as it read in 1870 by force of the amendment made in 1869), "except where the same are inconsistent or in conflict with the provisions of this act, shall be taken and construed as a part of this act, and be and remain in full force and effect throughout the whole of this state."

That act now prevents not only in the city of New York, but anywhere in the state, the granting of any license, except as part of one authorizing the keeping of an inn, tavern, or hotel, to "sell strong or spirituous liquors or wines to be

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drank upon the premises," because the provisions of the act of 1857 are still operative "except where the same are inconsistent or in conflict with the provisions" thereof; and the act of 1857 having expressly forbidden the granting of any such licenses except to hotel keepers, the court of appeals in *The People agt. Smith* (69 N. Y., 175) decided that that provision of the act of 1857 was not inconsistent with the act of 1870, and was therefore by the language of the act of 1870, to "be taken and construed as a part thereof."

There is no direct provision in the act of 1870 for the granting of ale or beer licenses as such, but authority is given "to sell and dispose of * * * strong and spirituous liquors, wines, ales and beer in quantities less than five gallons at a time." This general license, however, as we have seen, the court of appeals have held could not be granted except to a hotel keeper, because the restrictions placed upon the granting of licenses to sell "strong or spirituous liquors or wines to be drank upon the premises," by the act of 1857 were not repealed, but were in full force. But the act of 1857 (as amended, for in 1870 the amendments were a part of it) also provided for the granting of licenses "for the sale of ale or beer * * * to other than those who propose to keep an inn, tavern or hotel," and as that provision was not at all inconsistent with the act of 1870, which, whilst it provided for a general license to sell all kinds of intoxicating drinks to be granted, as held by the court of appeals, only in connection with a tavern or hotel license, did not abrogate and annul the power to grant ale or beer license only, it must now (for the act of 1870 so requires) "be taken and construed as a part" thereof, and be deemed to be "in full force and effect throughout the whole of the state." In other words, the power to grant a general license to sell intoxicating drinks, including ale and beer, conferred by the act of 1870, which can only be granted to a hotel keeper, is not inconsistent with, and does not take away the power to grant an ale or beer license only to a person not a hotel keeper, which the act of

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1857, as amended in 1869 authorized, and therefore such provision of the act of 1857, because it is not inconsistent with said act of 1870, is by said act of 1870 made applicable to "the whole of the state."

The full argument, which has been for its proper understanding somewhat protracted, may be thus tersely stated: By the act of 1857, as amended in 1869, in addition to one permitting the sale of intoxicating drinks in small quantities not to be drank, however, upon the premises of the seller, two kinds of licenses could be granted. First, A license to sell strong and spirituous liquors and wines to be drank on the premises of the persons licensed, to be granted only, however, to persons who kept an inn, tavern or hotel; and second, An ale or beer license "to others than those who propose to keep an inn, tavern or hotel." This ale or beer license, however, was engrafted in 1869, upon the act of 1857, and was not applicable to the Metropolitan police district, for which a separate and distinct license law existed, passed in 1866, under which a general license to sell all kinds of intoxicating drinks could be issued, although the person licensed kept no inn, tavern or hotel. In 1870, however, another license law was passed, which repealed the local Metropolitan police district act, and made such act of 1870, and the act of 1857 as changed and amended in 1869, when not inconsistent with the act of 1870, applicable to the whole state. The act of 1870 did not profess to take away the power to grant a license for the sale of ale and beer only, nor was the right to grant a general license to sell all intoxicating drinks, including ale and beer, inconsistent with the special license allowed by the act of 1857, as amended in 1869, for the sale of ale and beer only, and because not repealed or inconsistent with the act of 1870, such authority to grant ale and beer licenses only became from that time operative over the whole state, including of course the city and county of New York, because said act of 1870 so expressly provides.

It follows, of course, that the defendants in granting the

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license complained of violated no law and were guilty of no offense, and that no warrant can issue to bring them before me to answer. It is their duty to execute the law as it is, and both they and judges are to interpret it as it reads, and neither are responsible for provisions which may not meet their approval as citizens.

The foregoing opinion was prepared to this point some days ago. Since its preparation my attention has been drawn to a decision of a brother judge (judge BARNARD), which, as reported in the public press, holds that there is no power now to grant anywhere in the state a license for the sale of ale and beer only, separate and apart from a hotel license. The sincere respect entertained for his learning and judgment has induced me to review my conclusion hereinbefore expressed, but such review has not in the least shaken my conviction. After careful and further reflection I am still constrained to hold that the act of 1870, when it declares, "the provisions of the act passed April 16, 1857, except when the same are inconsistent or in conflict with the provisions of this act, shall be taken and considered as a part of this act, and be and remain in full force and effect throughout the whole of this state," refers to the act of 1857, as it read, when such language was used, and not to it as originally enacted. The reference to the act is a general one and there are no words limiting and controlling the reference. The amendments of 1869 were then part and parcel thereof, as much so as its original provisions. It is not the act *as* passed in 1857 which is made operative over the entire state, but "*the* act" *of* 1857, or "*passed*" in 1857, for either word—"of" or "*passed*"—in that connection has the same signification. If the act of 1870 had declared that the act of 1857 was thereby repealed, it seems to me clear that the entire law as it read in 1870, with all its amendments engrafted thereon and then forming integral parts thereof, would have been abrogated, and, therefore, when the act of 1870 does not profess to repeal that of 1857, but re-enacts all the provisions of the latter

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not inconsistent with its own and extends them over the entire state, that such enactment and extension apply not only to its original provisions, but to all others which had since become and then were substantial and vital portions thereof. It certainly, as it may be urged, would have been easy for the legislature, in speaking of the act of 1857, to have added the words "as amended," and it would have been equally easy if the amendments were not also made applicable to the whole state, to have so declared in plain words. Neither, however, has been done, and the simple question then is, does a general reference to a statute, which at the time of such reference is in an amended form, intend the statute as originally passed, or the statute as it reads at the time of such reference? This question can only admit of one answer, as shown in the former part of this opinion, and that must be, such a reference is to the act as amended.

There is also another answer to any assertion, if such has been made, that there is no authority now in boards of excise to grant an ale or beer license in any part of the state outside of the old Metropolitan police district, and it is this: The question before me is, was the act of 1869, because amendatory of the act of 1857, expressly extended over the city of New York by the act of 1870? Unless this question can be answered in the affirmative the complaint against the police commissioners of the city of New York is well founded, for the act of 1869 excepted such city, as a part of the Metropolitan police district, from its provisions. Suppose, however, I am wrong in the conclusion that the act of 1870, by extending the provisions of the act of 1857 over the whole state, thereby also necessarily extended the act of 1869, which was simply amendatory of that of 1857, over the same territory, when and where was the provision of such act of 1869 permitting the commissioners of excise to "grant licenses for the sale of ale or beer * * * to other than those who propose to keep an inn, tavern or hotel," and which provision was declared to "extend to all portions of the state

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except the Metropolitan police district," repealed? There certainly is no statute which directly repeals it; and as repeals by implication are not favored in the law it must be shown that some later statute contains provisions necessarily inconsistent therewith before a right so clearly and expressly conferred can be taken away. A careful search by me has failed to discover any subsequent enactment which is repugnant thereto. Plainly the act of 1870 is not inconsistent therewith, for that, as we have shown in the former part of the opinion, only confers the power to grant a general license for the sale of all intoxicating drinks to a hotel keeper; and such general license is not inconsistent with the special one for the sale of ale or beer only by an individual who is not a hotel keeper. The two licenses are of course different, but difference and repugnance are not synonymous expressions. A power to do several acts under circumstances clearly prescribed is not incompatible with or repugnant to an authority to do only one of those acts under a different condition of things, though the two grants are certainly unlike. This proposition is too clear to admit of discussion, and the question may, therefore, well be repeated, when and where was the authority given by the act of 1869 to grant an ale or beer license anywhere in the state, except in the Metropolitan police district, taken away? If it has been I have been unable to discover the repealing statute. Indeed, it was plumply decided as early as December, 1874, by the general term of the supreme court for the third department, held by judges BOOKES, COUNTRYMAN and LANDON (*O'Rourke* agt. *The People*, 3 *Hun*, 225), that the power to grant ale or beer licenses still existed. The opinions of judges BOOKES and COUNTRYMAN in that case are so exhaustive as to leave nothing to be said, and are, therefore, referred to as conclusive upon the question at issue. Now if, to make the argument applicable to the case before me, it be conceded, as it seems to me it must, that the power to grant such licenses anywhere in the state, except in the Metropolitan police district, exists, why

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should the act of 1870 be so construed as to make that district an exception to the rest of the state? The act of 1870 certainly repealed its local excise law and intended to extend all the provisions regulating the sale of intoxicating drinks in the residue of the state over that locality. If it has not done so, it is because of a failure to express the plain purpose. No proper construction of language used, as we have endeavored to show, makes such a conclusion necessary; and the evident propriety of so construing statutes as to work equally rather than unequally over the whole state, fortifies the argument already made to demonstrate that the act of 1870, in extending the provisions of that of 1857 over its entire territory, necessarily carried those of 1869, which had become a part of such act of 1857, with them.

To prevent any misapprehension as to the scope of the foregoing opinion it should be added that whilst, in my judgment, the parties complained of committed no crime in granting a license for the sale of ale or beer, that it is not held that any obligation to grant licenses of that character devolves upon boards of excise. No such question is involved in the proceeding before me, but as the act is very clear (*section 4, chapter 856 of Laws of 1869*) it may not be improper to say, in its very words, that such licenses are "in their discretion."

SUPREME COURT.

In the Matter of the Petition of JANE KNAPP, as executrix, &c.

Attorney and client — Their relations as to compensation — Attorney's charges against executors — Attorney not entitled to charge for his services as a lobbyist.

It is the duty of the court, in a case where an attorney retains money collected by him, as compensation for professional services rendered and disbursements expended by him, to see to it that while the attorney is protected in his legal rights, and fairly compensated for his services, he does not take the slightest advantage of his particular relations to his

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client, or of the fact that the disputed moneys are in his own hands and may be retained by him under his lien until his compensation is adjusted.

It must be shown, where the charges are against an executor, not only that they are a fair compensation for such services, but that they were the proper subject of charges against an executor, and were necessary under the circumstances.

Interviews with creditors of the estate and the answering of their inquiries are not the proper basis of a claim against the client of the attorney.

A lawyer has no right, while acting merely as a lobbyist, to ask the court to consider him as entitled to the protection and compensation generally regarded as due to the office of attorney and counselor.

First Department, General Term, September, 1880.

APPEAL from order of special term, denying petition for order directing payment of moneys collected, &c.

John McCrone, for appellant.

Ambrose Monell, for respondent.

DAVIS, *P. J.*—The right of an attorney to retain in his hands moneys collected by him, as compensation for professional services rendered and for disbursements expended by him, is settled (*Bowling Green Savings Bank agt. Todd*, 52 *N. Y.*, 489). It is questionable whether it would not have been better for the morale, as it certainly would for the reputation of the profession if it had been otherwise adjudicated. The temptation, where money is already in an attorney's hands, to make his charges square with the total of his debit would not then have existed with the same force, nor would the sarcastic and severely unjust definition of a lawyer, as "one who rescues your estate from your enemy and keeps it himself," have been so often apparently just. No duty to be performed by a court is more delicate and embarrassing than the disposing of controversies between attorneys and their clients in relation to the payment of moneys in the hands of the former, and which are retained and claimed as compensation for services. Clients

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who claim to be aggrieved are apt to, and always do if beaten, suppose that the attorney is favored and protected by the court, while on the other hand, the attorney, if compelled to refund what he believes he has properly applied to his just and reasonable charges, fancies that his professional relations to the courts have induced them to apply to his case harsher rules than govern ordinary litigations. It is the duty, however, of the court in such cases, which are addressed largely to the judicial conscience, to see to it that while the attorney is protected in his legal rights and fairly compensated for his services, he does not take the slightest advantage of his particular relations to his client, or of the fact that the disputed moneys are in his own hands and may be retained under his lien until his compensation is adjusted. He must not be permitted in any case to demand and receive more than his just compensation by operating upon any fear of his client, real or imaginary, that his possession of the funds is a "coign of vantage" from which he cannot easily be dislodged, or through a belief that he can make a contest over the claim more injurious to his client than submission to an inequitable demand. In the case now before us, it is very plain that the attorney rendered much and valuable service to the petitioner and her testator; and evidence was given before the referee by able and honorable lawyers to the effect that the sum retained was no more, in their opinion, than a fair compensation for the services he testified he had rendered. But the witnesses and the referee did not closely look into the nature of the services, with a view to see whether they should all have been, or were, the proper subject of charges against the petitioner; or whether, although rendered, they were satisfactorily shown to have been necessary under the circumstances. These are questions which we feel bound to consider. Among the items of the account are these: "General professional services rendered the executrix in regard to claims against the estate, and various consultations with her in reference thereto, interviews innumerable with various creditors of the estate, \$250. Gen

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eral professional services rendered in reference to the claims presented against estate of Knapp, including at least fifty interviews with the different creditors, \$200." Succeeding these are numerous charges itemized and specified for services in all the litigations of the petitioner and her testator, in which the respondent seems to have been employed; and for various services outside of the litigation and relating to the estate. In respect to the above charge of \$250, the respondent testified: "Mr. Knapp had a very large number of creditors, mostly workmen, who had worked upon buildings where he had contracts, and they had claims against him. They were constantly calling at my office. I got them to present their claims in the proper way, and they kept calling on me to see whether their claims would be paid. These are the services for which I make charge in my bill." And when asked "Did you render these services to Mrs. Knapp?" the answer was "It was rendered in the general course of my business with this claim." "What had this to do with the claim? Nothing, except the creditors were looking after the claim out of which they were to be paid, and they knew that I had it in charge." It is apparent from the testimony that there is no other foundation for the item than the fact that creditors of the estate were running into the respondent's office to inquire how he was getting along with the claim against the city, and his answering their inquiries is substantially those services for which \$250 is charged. He was not employed by the executrix to make such answers. If they were the subject of charges, the persons making the inquiries should pay the same; but it seems plain they were nothing more than that kind of incidental annoyance to which every lawyer who is prosecuting claims on behalf of an estate is constantly subjected by creditors who are anxious to ascertain the sources from which payment may be expected. Such inquiries are answered by courtesy, and it requires some ingenuity to torture them into the basis of a claim against a client of the attorney. It is highly probable that the creditors would have

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refrained from the inquiries if they had supposed each inquiry was diminishing the sum out of which they hoped to receive their pay. I think the referee should have disallowed the item. In reference to the item of \$200, there is practically no explanation in the testimony. It looks very much as though it was interposed to swell an apparent aggregate to a sum that would make a gross charge of \$4,000 look more reasonable. The referee fixed the value of the services at a gross sum. We cannot distinctly see that he allowed any particular item as charged in the account; but we think it our duty to scrutinize closely such items as seem to have no substantial basis. This charge is also made wholly or in part for answering the casual and frequent inquiries of creditors, and falls, in part at least, within the criticism given to the item of \$250.

The portion of the bill for services in suits and litigations and proceedings in the surrogate's court, seem to have been properly allowed.

The bill includes charges for attendance and disbursements at Albany to procure the passage of a general act of the legislature, under which claims of the kind for which suit was brought by the respondent for the testator could be audited by a commissioner, and paid. The charge is for attendance seventy-eighth days at Albany at thirty dollars per day, and for expenses amounting to \$661.18. For the most part these services were not professional. They appear from the testimony of the respondent to have been in part services which a lawyer may properly render in appearing before a committee of the legislature, and explaining and advocating the passage of a bill for the benefit of a client; but by far the greater part appears to have been what is commonly called "lobbying," a sort of business which has never received the encomiums of the courts, and never been accepted as within the scope of professional duty or service. A lawyer may do it, it is true, as he may do a great many other things outside of his profession, but he has no right, while acting merely as a lobbyist, to ask

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the court to consider him as entitled to the protection and compensation generally regarded as due to the office of attorney and counselor. I think it would have been better to have remanded claims for such services to the consideration of a jury, upon "a *quantum meruit* for work, labor and services," rather than to treat them as claims for the exercise of legal knowledge and skill. It does not satisfactorily appear why it was necessary to harass the legislature *die in diem* for fifty-eight days of a single session to procure the passage of a general act, the merits of which were so apparent, as to receive the recommendation of the chief financial officer of the city. The respondent describes his services in attending the legislature of 1877 as follows: "I was in attendance at Albany every week of the session of the legislature of 1877 for two to four days. I generally went up with the members on Monday and came down with them on Friday when they returned. Q. Now what were the special services that you rendered? A. Were generally done in introducing and procuring the passage of the bill, including various attendances before the committee. Q. What committee? A. In the senate, the committee on cities, and in the house, the judiciary committee. Q. How many arguments did you make before each committee? A. At least three before each committee. Q. How long a time did these arguments occupy? A. Not a very long time; they would not let you speak very long there. Q. What else occupied your time after the arguments were concluded? A. Endeavoring to secure assistance for the passage of the bill; * * * talking to the members of the legislature, explaining the bill." There do not appear to have been any improper appliances used to procure the passage of the bill; but it seems strange that such long persistency of effort should have been required for its passage. A lawyer's time, labor and expenses in the line of his profession may be worth forty dollars a day, but this work was not in the line of his profession, so far as it was outside of legitimate arguments before the committees. It seems hard that the

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petitioner should be compelled to bear the burden of professional prices for services altogether non-professional in procuring the passage of a general act under which she shares, with many others, benefits common to all. Certainly the respondent should have made known to her what he was doing and charging, and given her some opportunity to decide for herself whether she would employ him in such outside labors at a cost to be measured by professional services in courts of justice. Besides, the services were not authorized by her, and the respondent does not testify that they were. I am of opinion that the referee should have cut down these charges to a more suitable figure. On the whole I am of opinion that at least \$1,500 less than the sum reported should have been allowed to the respondent, and that the order should be reversed and an order entered directing the payment to the petitioner of the sum of \$1,500, and the costs and disbursements of this appeal.

SUPREME COURT.

GEORGE H. FLETCHER, receiver, &c., agt. MARY MARSHALL
COOPER and another.

Change of venue — Code of Civil Procedure, section 982.

Where two causes of action, described in the complaint, related to real property situated in the *county of Kings*, and the other causes of action related to personal property :

Held, that the place of trial should be changed from New York, where it was improperly laid, to the county of Kings.

Section 982 of the Code of Civil Procedure considered.

Special Term, October, 1879.

MOTION to change venue.

Fletcher agt. Cooper.

Albert G. McDonald, for motion.

Frederick S. Waite, opposed.

VAN VORST, *J.*—The second and fourth causes of action relate to real property situated in the county of Kings. The third cause of action relates to personal property. All the parties reside in Kings county. Kings is therefore the proper county for the trial of this action, and the venue must be changed to that county, unless the fourth cause of action will hold it in the county of New York under the provisions of section 982 of the Code of Civil Procedure.

Upon a consideration of the first cause of action, I am led to the conclusion that it does not, in substance, affect an estate, right, title, lien, or other interest in real property or a chattel real.

As far as the mortgage upon the land in New York city is concerned, its lien is destroyed by the judgment in partition and the proceedings thereunder. It no longer affects lands, and what is really sought to be reached under the first count, is the money secured by the mortgagee for the interest of the mortgagor in the partition suit.

An adjudication that the mortgage, which has been really extinguished, in so far as its lien upon the lands is concerned, was fraudulent in its inception, affects no present interest in real property.

The motion to change the venue is granted, with costs of the motion to the defendant to abide the event.

Spence, agt. Baldwin.

SUPREME COURT.

VIRGINIA W. SPENCE agt. GEORGE R. BALDWIN.

Order of arrest — False representations — Deceit — Repudiation of settlement because of fraud — Surrender of notes given in settlement — Condition of upholding order — Filing notes with clerk of court in lieu of tender or surrender — When so filed order of arrest will be sustained though no tender or surrender was made before suit.

In an action to recover damages for a sum of money embezzled by defendant while acting in a fiduciary capacity as agent of plaintiff, where defendant collected such money and after appropriating it to his own use gave secured notes to plaintiff for the amount embezzled, representing that the notes were well secured when they were not:

Held, that because of the false statements made by defendant in inducing plaintiff to take the notes plaintiff could repudiate the settlement for fraud.

And where, on a motion by defendant to vacate the order of arrest granted in the action, the point is raised that no tender or surrender of the notes received in settlement was made before the commencement of the action:

Held, that the notes must be surrendered, and such surrender must be a condition of upholding the order of arrest. The notes must be filed with the clerk to await the final order of the court. If this is complied with the motion to vacate the order of arrest will be denied.

New York Special Term, July, 1880.

THIS was an action brought by plaintiff to recover as damages a sum of money fraudulently embezzled and converted by defendant while acting in a fiduciary capacity as agent for plaintiff.

Defendant was arrested on the complaint and an affidavit showing defendant thus collected the money and appropriated it to his own use.

The defendant moved to vacate the order and set forth, by affidavit, the fact that secured notes were given plaintiff in settlement of the claim, and alleged that such notes were still

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retained by plaintiff and that they are now in possession of plaintiff's attorney.

The motion to vacate came on to be heard before Hon. T. R. WESTBROOK, July special term.

A. Simis, Jr., for motion, urged: The acceptance of the notes by plaintiff merged the original indebtedness in the higher security, and the cause of action was on the notes; and plaintiff having taken the notes in settlement the character of defendant's liability was changed and he could not be arrested, especially as plaintiff still holds the notes, and cited *Wisner agt. Ocumpaugh* (71 N. Y., 113); *Jagger Iron Company agt. Walker* (76 N. Y., 521); *Frisbie agt. Larned* (21 Wend., 450); *Southwick agt. Sax* (9 Wend., 122); *Nexsen agt. Lyell* (5 Hill, 466); *The Alliance Insurance Company agt. Cleveland* (14 How., 408).

E. C. Ripley, opposed.

I. The sum claimed is not for an "indebtedness," but for damages for fraudulent conversion and embezzlement.

II. The plaintiff was induced to accept the notes of defendant by trick and device, and by grossly false and fraudulent statements. The defendant stated to plaintiff that the notes were perfectly good and would be paid at maturity, and that they were secured by a mortgage to one Pierrepont, as trustee, which was perfectly good, and upon property that would sell for fully enough to satisfy and pay all the notes secured; that said notes have not been paid; that they have all matured and been dishonored; that said mortgage was a fraud; that the mortgage only covered an equity of \$200 or \$300, and that the makers of the notes were now contesting their validity.

WESTBROOK, J. — I have no doubt of the soundness of the law stated by defendant's counsel, but I think it has no application to this case.

The notes were accepted by reason of false statements made

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by defendant, and plaintiff could repudiate the settlement for fraud. The notes must be surrendered, and such surrender must be a condition of upholding the order of arrest. The notes must be filed with the clerk to await the final order of the court in this action. If this is complied with the motion is denied.

No costs on motion as no tender of notes was made before suit.

SUPREME COURT.

GEORGE P. SHELDON, as receiver, &c., agt. THOMAS SAENZ
et al.

Sheriff's sale of land under execution — When sale will be set aside — Resale.

Though the court will not set aside a sale of land on execution, and order a resale, because plaintiff's agent bid less for it than he was instructed to bid by his principal, yet where the purchase at the sale is by the plaintiff, who is a receiver appointed by the court, charged with the duty of applying the property of the debtor to the payment of his debts, and the purchase is made for the receiver's individual benefit, the court will not tolerate such act on his part.

Special Term, September, 1880.

MOTION in behalf of the plaintiff to be relieved from his bid at sheriff's sale under execution. Also motion in behalf of M. F. De Casio, a judgment creditor, to compel the plaintiff to complete the sale.

MACOMBER, J. — The case of *Vandenburg agt. Briggs* (7 Cowen, 367) clearly decides that the court will not set aside a sale of land on an execution, and order a resale, on the ground that plaintiff's agent bid less for it than he was instructed to bid for it by his principal. The reason is stated to be that junior judgment creditors may have acquired by

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the sale the right to redeem, of which they cannot be deprived. The judgment creditor, De Casio, seems to be in a position where he is entitled to the protection afforded by the principle declared in that case, provided the real parties in interest, represented in this case by plaintiff as receiver, are bound by the act of the receiver. For the purposes of this motion, I assume that Mr. De Casio is a subsequent judgment creditor, and as such is entitled to redeem the lands from the sale in this action. I ought, perhaps, also to say that I feel bound by the authority already cited, and that I leave it to a court of higher jurisdiction to question or to deny its soundness. There is, however, in my judgment, a good reason why the court should not allow this sale to be completed. The plaintiff is the receiver of the firm of C. H. Marganita & Co., the members of which were the original parties plaintiff in this action, and received such appointment from the court in the month of August, 1879. He became thereupon charged with the duty of applying the property of C. H. Marganita & Co. to the payment and discharge of their debts, and to the return of the overplus, if any, to the debtors. He became the hand of the court for this purpose. He had not the right to purchase at the sale for his own benefit, nor will the court tolerate such act on his part, which, whether so intended or not, would work detriment to his trust. Yet it is clearly established on this motion, by the affidavit of the receiver himself, corroborated by the deputy sheriff and others, that upon the sale he bought the premises in his individual name and for his personal benefit. Nevertheless, he seems to be wholly unconscious of having committed any impropriety. The act, I apprehend, cannot be upheld by the court. I must also hold that the junior judgment creditor is presumed to know that such purchase was irregular, and that it could not properly be recognized by the court, and that the rights claimed by him as such junior creditor are subordinate to the power and duty of the court to see to it that its agents do not bring its decrees into disrepute.

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Had the plaintiff, as receiver, asked to be relieved of his bid because of unintentional and innocent violation of duty, I should grant the application, without costs. But, while I acquit him of any actual intent to enrich or benefit himself, I think I ought, under the circumstances, to impose costs to be paid by the receiver personally. The motion in behalf of the plaintiff is granted, with ten dollars costs of opposing it, to be paid by the receiver personally. The motion in behalf of Mr. De Casio is denied, without costs.

SUPREME COURT.

T. VINCENT TRIPP *et al.* agt. GEORGE H. SAUNDERS and
ANDREW J. GARDNER.

SARAH HALLIDAY agt. THE SAME.

Confession of judgment by one of several joint debtors — Code of Civil Procedure, section 1278.

A judgment cannot be confessed by one of several joint debtors, so as to bind the debtors not joining in the confession.

Section 1278 of the Code of Civil Procedure considered.

New York Chambers, December, 1879.

MOTION to set aside judgment entered upon confession by one of two joint debtors, and the execution thereon, for irregularity.

John A. Mapes, for defendant. Gardner, in support of the motion.

Homer A. Nelson, for plaintiff, opposed.

Tripp *et al.* agt. Saunders.

VAN VORST, *J.*— I think that their judgments are irregular.

Previous to the present Code of Civil Procedure, no judgment could be entered against joint debtors, on a confession by one (*Stoutenburgh* agt. *Vandenburgh*, 7 *How. Pr. R.*, 229; *Everson* agt. *Gehrman*, 10 *How. Pr. R.*, 301).

In the latter of these cases, a judgment entered on the confession of one of two partners or joint debtors, was held to be void as against the defendant not signing the confession, and could not be enforced against the joint property. Section 1278 of the Code of Civil Procedure, to which I am referred by the learned counsel for the plaintiff, is new. It authorizes one or more joint debtors to confess a judgment for a joint debt due or to become due. But it provides, that where all the joint debtors do not unite in the confession, the judgment must be entered and enforced against only those who confess it. The judgments in the above entitled actions, confessed by one partner, without the knowledge or consent of his copartner, have been entered and are attempted to be enforced, as though both were bound. The judgment is docketed against both partners, and executions have been issued against both defendants, without any special indorsement, and the joint property has been seized.

I think the true sense of the section of the Code above alluded to is, that one joint debtor may confess a judgment upon a joint debt so as to be enforced against his individual property, and that such confession and judgment is no bar to an action against all the joint debtors upon the same demand. This was to avoid the effect of a confession by one making the debt, by such confession, his individual debt exclusively (*Stoutenburgh* agt. *Vandenburgh*, *supra*).

The language of section 1278 differs essentially from that of section 136 of the former Code with respect to suits against joint debtors. This latter section provides that when a *summons* is served on one or more of several joint debtors, but not on all of them, the plaintiff may proceed against the defendant served, unless the court otherwise directs, and if

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he recover judgment it may be entered *against all the defendants jointly indebted*, so far only as that it may be enforced *against the joint property of all and the separate property of the defendants served*.

Section 1278 neither authorizes the judgment in form to be entered against the defendant not served, nor the seizure thereunder of the joint property.

And in so far as it affects the defendant Gardner it should be vacated and the executions should be set aside.

The defendant Gardner should recover ten dollars costs of this motion.

NOTE. — Affirmed on appeal to the general term. [ED.]

SUPREME COURT. .

CHARLES W. BLOSSOM agt. CHARLES W. ESTES.

SAME agt. SAME.

Attachment — Effect of failure to serve or publish the summons within thirty days — Who may move to vacate.

After an attachment is invalidated by failure to serve or publish the summons within thirty days after the issuing of the warrant, though the court may acquire jurisdiction and proceed with the action *in personam* upon the service of the summons or the defendant's voluntary appearance at a later date, yet the provisional remedy falls unless the service is effected or the publication commenced within the time prescribed by statute. A defendant has a right to move to vacate the attachment even if his object be to assist his assignees, the present Code expressly giving a status to other interested parties.

First Department, General Term, May, 1880.

APPEAL from two orders, one denying a motion to set aside a warrant of attachment, and the other denying a motion for leave to renew the first motion on additional affidavits.

Blossom agt. Estea.

L. H. Arnold, for appellant.

E. H. Hobbs, for respondent.

BARRETT, J.—It has been repeatedly held that an attachment is invalidated by the failure to serve or publish the summons within thirty days after the issuing of the warrant. The court may, of course, acquire jurisdiction and proceed with the action *in personam* upon the service of the summons or the defendant's voluntary appearance at a later date. But the provisional remedy falls unless the service is effected or the publication commenced within the time prescribed by statute. Here it is conceded that the publication was not commenced until after the expiration of the thirty days. This was not a mere irregularity but a jurisdictional omission which marked the destruction of the warrant. The alleged appearance, long afterward, did not revive the attachment. If authorized, it simply gave the court jurisdiction over the person of the defendant.

It is also urged that the motion, though nominally made by the defendant, is really in the interest of third persons claiming title to what was attached. It appears, however, that the attorney was employed by the defendant to make the motion, and the defendant himself furnishes an affidavit in support of it. The defendant has a right to so move, even if his object be mainly to assist his assignees, or though the latter may incidentally secure an advantage from his success. Indeed, under the present Code, in force when the motion was made, a status is expressly given to other interested parties. We think the attachment should have been vacated, and that the order in the first appeal should be reversed, with ten dollars costs and disbursements, and the motion granted.

It will be unnecessary, therefore, specially to consider the second appeal, although we must say that Mr. Hatch's affidavit would have justified a renewal of the motion even if we had sustained the respondent's view of the effect of an appearance.

Raymond agt. Brooks.

This affidavit threw doubt upon the fact of an appearance, and at all events it showed that if he did appear it was without authority.

The second appeal should, under the circumstances, be dismissed without costs.

SUPREME COURT.

JAMES RAYMOND, as sole administrator, agt. JOHN BROOKS
and others.

Examination of defendants to enable plaintiff to prepare his complaint.

In an action by the administrator of a deceased partner against the surviving partners, among other things for an accounting, the plaintiff is entitled to an order for the examination of the defendants in order to enable him to prepare a complaint, but the examination should be limited to an inquiry only into the facts necessary to be included in the complaint.

Special Term, October, 1879.

MOTION to set aside an order for the examination of one of the defendants, made to enable plaintiff to prepare his complaint.

VAN VORST, J. — In this case the plaintiff was entitled to the order for examination of the defendant. His affidavit discloses a cause of action; but it is quite clear that, in order properly to prepare his complaint, an examination of the defendant is necessary to ascertain facts to make an orderly pleading in a case of this description, which are necessarily within the defendant's knowledge, and of which the plaintiff may well be supposed to be, as he claims, ignorant.

But such examination is not to extend, in substance or

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form, to an accounting of the copartnership affairs, which is one of the objective points of the action itself. Such inquiry is not necessary to prepare a complaint.

The examination should only extend to an inquiry into such facts as are necessary to be included in the complaint, properly to set up the plaintiff's cause of action.

The plaintiff upon making this motion proposed to the parties, through their counsel, certain questions which were not answered.

I have looked at these questions, a copy of which accompany the motion papers.

The plaintiff suing in a representative character, and not having personally participated in the matters concerning which inquiry is sought, properly enough asks that he may be allowed to examine one of the defendants, who is reasonably supposed to have the knowledge, to ascertain the facts covered by these questions.

For the purpose of limiting the inquiry within such bounds as may properly adduce facts for the complaint, the questions above alluded to, excepting the fourth, tenth and thirteenth, may be put to the witness, and he should be called upon to answer them in this proceeding.

The motion to vacate the order of examination is denied, and the examination must proceed on the 3d day of February, 1880, at 10 $\frac{1}{2}$ A. M.

NOTE. — Affirmed on appeal to the general term. [Ed.]

Adams agt. Nellis.

SUPREME COURT.

HENRY C. ADAMS agt. JACOB C. NELLIS, as executor of the last will and testament of PETER G. FOX, deceased, impleaded with LAWRENCE M. FOX, defendants.

Trial before the court — What is meant by “decision” as used in section 1022, Code of Civil Procedure — Effect of death of a party before the “decision” is actually signed or rendered against him — Attorney — Effect of the death of a party to an action pending, as to the power and duties of his attorney.

Where a party dies before the “decision” is actually signed or rendered against him, in a cause tried before the court, such decision and all subsequent proceedings, including the judgment entered thereon, are void under section 765 of the Code, although an *opinion* in duplicate directing the findings of facts and conclusions of law, and giving the reasons therefor, was signed and delivered by the justice to the respective attorneys while such party was living.

The decision intended by sections 763, 765, 1010 and 1022 of the Code is the written findings of facts and the legal conclusions with the direction for the final judgment to be entered, and which must constitute a part of the judgment roll.

Until such a *decision* is signed and filed the cause is not removed from the authority of the trial court, but remains within its control; and although the justice may have signed and delivered his opinion stating the facts and conclusions, and the judgment that should be entered, other and different findings and conclusions may properly be made and a different judgment be directed from that stated to be proper in the opinion (*See Weyman agt. The National Broadway Bank, ante, 381*).

The death of a party to an action pending vacates the power of his attorney therein, and he is not required or authorized to do anything further in the action except upon the retainer of the legal representative.

Service of papers, in the action, upon an attorney therein after the death of his client is void and of no effect, and such service will be set aside on motion.

Special Term, July, 1880.

MOTION by defendant, Jacob C. Nellis, to set aside judgment entered herein, as irregular and void.

Heard at Ogdensburgh, first Tuesday in January, 1880.
Decided July 29, 1880.

Adams agt. Nellis.

James E. Dewey, for defendant Nellis, for the motion.

Henry C. Adams, plaintiff, attorney in person.

TAPPAN, J.—The action was brought against Peter G. Fox, as executor of one Archibald Fox and Lawrence M. Fox, to charge said Peter G. Fox, personally, with certain trust funds held by him as such executor.

An answer was interposed by said Peter G., and the issues of fact made thereby were tried at the Montgomery circuit in May, 1878, before the court without a jury. The justice before whom the cause was heard, wrote an opinion in which the facts found were stated, in connection with his reasons for such findings and his conclusions upon such facts, with a reference to authorities and a statement as to the judgment that should be entered, with the direction at the end, "Let findings and conclusions of law, in accordance with this decision, be drawn up for signature."

Duplicate copies were signed, and on the 10th day of January, 1879, mailed to the attorneys for the respective parties, and were received by them on the 18th day of January, 1879.

Peter G. Fox, against whom judgment was directed by such opinion, died on the 25th day of January, 1879, before any further proceedings had been taken in the action.

Subsequently, plaintiff drew findings of fact and conclusions of law, in accordance with the opinion and direction of the justice before mentioned, and the same were signed by him.

Subsequently, the defendant Nellis was appointed executor of the last will of Peter G. Fox, deceased, and the action was, on motion of plaintiff, continued against him, and thereafter plaintiff, upon notice to the attorney who had appeared for Peter G. Fox, and without other notice, entered judgment against the executor making the said opinion, findings of fact and conclusions of law, part of the judgment roll and authority for the judgment.

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Defendant Nellis now moves upon the judgment roll and affidavits that the findings of fact and conclusions of law, signed by the justice after the death of Fox, and the judgment entered thereon November 20, 1879, be set aside and vacated on the ground that the defendant Fox died before the decision was actually rendered against him; that after his death there was no party defendant till August 26, 1879, nor any attorney for said deceased or his successor in interest.

Section 763 of the Code of Civil Procedure provides, that if either party to an action dies after an accepted offer to allow judgment to be taken, or after a verdict, report or decision, or an interlocutory judgment, but before final judgment is entered, the court must enter final judgment in the names of the original parties, unless the offer, verdict, report or decision, or the interlocutory judgment is set aside.

Section 765 provides, "that this title does not authorize the entry of judgment against a party who dies before a verdict, report or decision is actually rendered against him. In that case the verdict, report or decision is absolutely void."

In determining this motion, it becomes necessary to decide what is intended to be a "decision" as used in these sections.

Section 1010 provides, that upon a trial by the court upon an issue of fact or of law, its decision in writing must be filed in the clerk's office within twenty days after the final adjournment of the term where the issue was tried. If it is not so filed, either party may move for a new trial upon that ground.

Section 1022 provides, "that the decision of the court, or the report of the referee upon the trial of the whole issue or fact, must state separately the facts found and the conclusions of law, and it must direct the judgment to be entered thereupon."

The decision intended by these sections is the written findings of facts and the conclusions of law, and the direction which is the authority for the final judgment to be entered, and must constitute part of the judgment roll.

The instrument signed by the justice and sent to the

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respective parties January 10, 1879, is ordinarily called a decision, but it is not the decision referred to in the sections quoted from the Code of Civil Procedure.

It was an opinion stating the conclusions of the court upon the facts and law, with the reasons and authority therefor, and directing findings and conclusions to be drawn up and signed.

Such findings and conclusions, when signed and filed, would constitute the decision of the cause, and when so made would have removed the cause from the authority of the trial court.

Until such decision the case was within its authority and control, notwithstanding the signing and delivery of the instrument of January 10, 1879.

When the decision contemplated by law was signed, the court could have properly made other and different findings and conclusions, and directed a different judgment from that stated to be proper in the opinion. For these reasons I think that no such decision had been made as the law contemplates, when Fox died, and that the subsequent findings of fact and conclusions of law, signed after his death, were void, and that such findings and conclusions, together with the judgment, entered upon the authority of the same, must be set aside (*See Thomas agt. Tanner*, 14 *How. Pr.*, 426; *Kissim agt. Hamilton*, 20 *id.*, 368; *Sands agt. Church*, 2 *Seld.*, 347; *Shearman agt. Justice*, 22 *How.*, 241; *Loeschick agt. Addison*, 3 *Robt.*, 332; *Amault agt. Sackett*, 17 *How.*, 507; *Chamberlain agt. Dempsey*, 14 *Abb.*, 241).

As a general rule, the death of the defendant operates as the vacation of the power of his attorney, and if it becomes necessary for the plaintiff to take any steps to affect the rights of his representatives, he must cause them to be brought in.

Although the Code is silent as to the manner in which the proceeding shall be taken to perfect a final judgment in the name of the original party, when a decision has been made and the party dies before judgment is entered, it would seem to be the better practice to have the personal representatives

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made parties for the purpose of perfecting such judgment. See *Beach* agt. *Gregory* (2 *Abbt. R.*, 203), where the reason for such practice is clearly stated by judge WOODRUFF.

The attorney of Fox was not bound, after his death, to do anything toward further litigation, unless upon the retainer of the defendant Nellis.

The service of papers upon Cushman, after the death of Fox, should also be set aside.

Motion granted, with ten dollars cost.

N. Y. SUPERIOR COURT.

JOHN C. RUST agt. CHARLES HAUSELT, impleaded with
HENRY RANCKE.

Appeal — Stipulation — Costs — Effect of stipulation given on appeal from order granting new trial.

Where judgment absolute was rendered against a defendant in accordance with his stipulation, given on appeal from an order granting to plaintiff a new trial, and a reference was ordered to ascertain the amount due to the plaintiff, the referee reporting that nothing was due to the plaintiff, but that there was a sum due to the defendant on his counter-claim:

Held, that the defendant's right to affirmative relief was lost by the judgment rendered on his stipulation, and that he could not enter judgment for the amount found due him (*See The People* agt. *Denison*, ante, 157).

The court of appeals, in affirming the judgment of the general term, ordering a new trial, with judgment absolute for the plaintiff, said, "with costs:"

Held, That that judgment for costs carries the general costs of the action from beginning to end, except the costs of the appeals taken by plaintiff from the order confirming the report of the referee, which were specially adjudged to the defendant, and that these costs should be offset against each other, and judgment should be entered for the plaintiff for the excess.

Special Term, August, 1880.

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MOTION by defendant for leave to enter judgment upon a referee's report, and motion submitted by both parties to offset costs, both motions being heard without notice upon stipulation of counsel.

The action was begun in April, 1875. The plaintiff in his complaint alleged that he and his copartner, one Henry Rancke (who was made a defendant because he declined to unite with him as a plaintiff), on the 23d day of October, 1873, made an assignment to the defendant for the benefit of their creditors; that the defendant, with the assets of the firm, had discharged their debts and liabilities, and had remaining in his hands a considerable surplus; that Rancke had transferred his interest in such surplus to the plaintiff; demanded an accounting and asked judgment upon such accounting that the defendant pay over to him the sum remaining in his hands.

The answer of the defendant admitted the assignment and the payment of the indebtedness of the firm of Rancke & Rust, except that due himself, but alleged that the defendant had already rendered an account of his assignment, on which it appeared that the surplus remaining in his hands was not sufficient to discharge the indebtedness of the firm to himself. For a second defense he alleged that he had before the beginning of the suit stated to the plaintiff his account as such assignee, and that on such accounting the balance due him from the firm was \$1,881, for which he asked judgment against the plaintiff and against his codefendant Rancke. The reply of the plaintiff denied the counterclaim.

The case was tried in November, 1875, before a judge without a jury, who dismissed the complaint and ordered judgment for the defendant Hauselt against the plaintiff Rust, and against his codefendant Rancke, for the sum of \$1,881.

On appeal to the general term, on the 8th of May, 1876, the judgment of the special term was reversed. The judgment first entered upon such reversal did not direct a new trial (9 *Jones & Spencer*, 467).

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The defendant Hauselt thereupon appealed to the court of appeals from the judgment of reversal, without giving the stipulation required by section 191 of the Code upon an appeal from a judgment ordering a new trial.

The court of appeals declined to hear the appeal unless the notice of appeal was amended by inserting such stipulation upon the argument. That being done the court of appeals heard the argument, but dismissed the appeal on the ground that it was from a simple order of reversal from which no appeal would lie to that court (69 *N. Y.*, 485). Thereupon, by stipulation of counsel, the order of this court, dated May 8, 1876, was so amended as to reverse the judgment of the special term and to order a new trial; and judgment to that effect was entered.

From this judgment the defendant Hauselt again appealed to the court of appeals, giving in his notice of appeal the stipulation required by section 191 of the Code — that if the order for a new trial should be affirmed, judgment absolute should be rendered against him.

At the March term of the court of appeals, in 1879, the order of the general term of the superior court was affirmed, and judgment absolute for the plaintiff on the stipulation, with costs, was ordered (76 *N. Y.*, 614).

The judgment of the court of appeals was in due form made the judgment of the superior court. It was then, at a special term of this court, on the 29th day of March, 1879, ordered that the plaintiff John C. Rust have judgment absolute against the said defendant Charles Hauselt, with costs. It was further ordered that it be referred to a "referee to state the account and to ascertain and determine the sum or amount which was due from the defendant Charles Hauselt to the plaintiff John C. Rust, under the judgment of the court of appeals and the judgment of this court entered thereon."

The parties attended before the referee, who reported July 8, 1879: "That the defendant Hauselt received under the

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assignment the sum of \$13,000; that he paid to creditors of the firm \$11,235.32, leaving a balance of \$1,764.68; that the indebtedness to Charles Hauselt was recognized and stated in the statement of liabilities of said firm, furnished to him by said firm at the time of said assignment, to be the sum of \$3,000; that all of said balance is not sufficient to pay the indebtedness due the said Hauselt from the said firm, irrespective of his commissions as assignee; that he has ascertained and reports that there is no sum or amount whatever due from the said defendant Charles Hauselt to the plaintiff John C. Rust."

The defendant took up and filed the referee's report and moved for its confirmation. No exceptions to the report having been filed it was confirmed, as of course, under rule 30. An appeal from the order confirming the report was taken by the plaintiff. The general term affirmed the order. An appeal from this order of affirmance was dismissed by the court of appeals June 10, 1880.

The defendant then attempted to tax the costs of the action. The clerk declined to tax his costs, on the ground that the costs had not been awarded to him. The court sustained the clerk's ruling. The defendant then attempted to tax, as his disbursements, the eighty dollars paid the referee upon taking up his report. This was refused by the clerk, and judge FREEDMAN, before whom the matter was taken, sustained the clerk, holding that disbursements followed costs, and that a party not entitled to costs was not entitled to tax disbursements.

Now the defendant seeks to enter an affirmative judgment against the plaintiff for the amount of the indebtedness of Rancke and Rust to him, stated in the computation of the referee as remaining unpaid after the application of all the moneys which came into his hands by virtue of the assignment. The question then is whether, under the circumstances recited, the defendant is entitled to enter such judgment, and what costs the respective parties are entitled to.

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Edgar Whitlock, for plaintiff.

Louis Sanders, for defendant.

RUSSELL, *J.*— The defendant claims substantially the same rights as if the reference ordered for the purpose of carrying out the order of the court of appeals giving the plaintiff judgment absolute were an ordinary reference to hear, try and determine all the issues in the action on the coming in of the report as to which he would be entitled, as a matter of course, to enter judgment.

There are two objections to this theory: In the first place it was not such a reference, but a reference to state the accounts and to report what was due the plaintiff. In the next place the defendant's rights must now be considered with reference to his stipulation on appeal from the order granting a new trial to the court of appeals, and the determination of the court of appeals rendering judgment absolute against him.

What was the effect of that stipulation and judgment? Did it mean something or nothing? Could the defendant stipulate that judgment absolute should be rendered against him, and under such a judgment still enter an affirmative judgment for all that he originally claimed?

I think not. Any right which he had to the affirmative relief claimed in his answer was lost by the judgment of the court of appeals on his stipulation, so that when the case came back to the superior court, it stood in the same position as if there had been no answer interposed — at any rate, no answer asking for affirmative relief. The court might have taken the account, and, having ascertained that there was nothing due the plaintiff, ordered judgment for the plaintiff simply for costs, in conformity with the decision of the court of appeals. It chose instead to have the examination made by a referee under its direction.

The defendant acquired no new rights by reason of the

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matter being sent to a referee. The referee was simply to perform an act for the court, mainly ministerial, whereupon it became the duty of the court to enter a final judgment in conformity to the decision of the court of appeals.

There cannot be such a thing as a judgment absolute for the plaintiff, and a finding for defendant of a larger balance due him (*Shufelt agt. Rowley*, 4 *Cowen*, 58).

In *Thompson agt. Lumley* (7 *Daly*, 74), which was an action for malicious prosecution, the complaint was dismissed at the trial. The general term reversed the judgment and ordered a new trial. The court of appeals affirmed the order and ordered judgment absolute for the plaintiff, upon the usual stipulation. The case coming back to the common pleas, damages were assessed by a judge and petit jury. On the assessment of damages, judge VAN BRUNT ruled that the plaintiff need give no evidence as to the payment of the sum of \$700 costs and counsel fees, alleged in the complaint to be special damages, because the judgment of the court of appeals established that claim. Motion was made to vacate the assessment of damages, which was denied, and on the appeal from the order denying that motion, chief justice DALY said :

“The effect of the judgment of the court of appeals was the same as if the whole of the plaintiff's cause of action had been admitted. It was equivalent to an admission, by a failure to put in an answer, that the defendants had, maliciously and without probable cause, caused the plaintiff to be arrested, imprisoned and prosecuted upon a charge of perjury. But the amount paid for counsel fees and costs the plaintiff had to prove upon the assessment, for that was in no way settled by the judgment of the court of appeals, the effect of which was simply to establish the plaintiff's cause of action as averred in his complaint, but nothing more, and the ruling of the judge upon this point was, in my opinion, erroneous (*P.* 76). * * * As respects the assessment of damages in this case, it is to be regarded as analogous to a

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default upon a failure to answer, and to be governed by the practice which existed upon assessing damages upon an inquest at the circuit or upon a writ of inquiry before a sheriff's jury" (P. 78).

What, then, is the effect of an admission by failure to answer? Clearly, that the plaintiff in an action is entitled to the relief demanded.

It would be an extraordinary thing for a defendant who did not answer to get an affirmative judgment in the nature of a counterclaim.

In *Wright* agt. *Delafield* (25 N. Y., 266) the plaintiff brought his action to restrain the prosecution of actions pending against him on notes given for the purchase of land, on the ground of defective title, and prayed that the defendant might be required to make a good title and convey. There was a pure defense to the action, which prevailed. But the judge before whom the case was tried, without a jury, not only dismissed the complaint, but gave judgment for the defendant for the amount of the notes. The plaintiff appealed from this judgment, and it was reversed because there was no claim in the defendant's answer for judgment upon the notes. SMITH, J., delivering the opinion of the court, said:

"The principle still remains that the judgment to be rendered by any court, must be *secundum allegata et probata*, and this rule cannot be departed from without inextricable confusion, uncertainty and mischief in the administration of justice. Parties go to court to try the issues made by the pleadings, and courts have no right to make new issues for them on the trial, to their surprise or prejudice, or to find judgments on grounds not put in issue and distinctly and fairly litigated" (See, also, *Kniffen* agt. *McConnell*, 30 N. Y., 285, 290; *Stephens* agt. *Hall*, 2 Robt., 674; *Doyle* agt. *Mulrein*, 1 *Sweeney*, 521; *Norbury* agt. *Seeley*, 4 How. Pr., 73; *Glen Manuf. Co.* agt. *Hall*, 6 *Lans.*, 158).

The rendering of an affirmative judgment in favor of a party who had stipulated that judgment absolute should be

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rendered against him would be quite as improper as to render judgment in his favor for what his pleadings did not claim.

It is suggested that the case of *The People* agt. *Denison* (*ante*, 157) is an authority for the position here taken by the defendant. I think not. In that case the action was brought by the People to recover certain sums of money alleged to have been overpaid to the defendants by fraudulent collusion with certain officers of the state government. The defense was a denial and a counterclaim. The referee reported in favor of the plaintiffs for the amount claimed. The general term reversed the judgment entered thereon and ordered a new trial. An appeal was taken by the attorney-general from the judgment and order of the general term to the court of appeals, the usual stipulation being given. The action of the general term was affirmed and judgment absolute for the defendants rendered. The judgment of the court of appeals having been made the judgment of the supreme court, the defendants, without any further action or order, entered judgment against the state for the amount of their counterclaim. Motion was made by the attorney-general to set aside this judgment. Judge WESTBROOK granted that motion — first, because a sovereign state which has never authorized the bringing of suits against itself in its own courts for the recovery of any debt or obligation supposed to be owing by it, but which has established a state board of audit for the purpose of hearing and deciding all private claims, cannot have a judgment rendered against it in the courts; second, because, even if such a judgment could be rendered at all, inasmuch as the counterclaim was not litigated or considered upon the trial before the referees, the defendants could not have judgment for the amount claimed without an assessment of damages pursuant to section 194 of the Code. Certainly this case cannot be an authority for the entry of judgment by a party who has stipulated that judgment absolute should be rendered against him.

In the *Denison* case, the defendant, in whose favor judg

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ment absolute had been ordered, sought to enter judgment without having his damages assessed, and was forbidden.

In the case at bar the defendant, against whom judgment absolute has been ordered, seeks, nevertheless, to enter judgment for all he ever claimed. This he cannot do.

The court of appeals, in affirming the judgment of the general term, ordering a new trial, with judgment absolute for the plaintiff, said, "with costs."

I am of opinion that that judgment for costs carries the general costs of the action from beginning to end, except the costs of the appeals taken by plaintiff from the order confirming the report of the referee, which were specially adjudged to the defendant Hauselt.

These costs should be offset against each other, and judgment should be entered for the plaintiff for the excess.

N. Y. MARINE COURT.

MORRIS WENTZLER agt. JOSE B. ROSS.

Attachment against property—Fraudulent disposition—Code of Civil Procedure, section 8169.

The failure to allege, in the language of section 8169, subdivision 5 of the Code of Civil Procedure, that the defendant is an adult is not material. The law will presume that he is an adult, and what is presumed need not be otherwise proved in the first instance.

Facts stated in an affidavit upon information and belief are evidence where the affiant gives the sources of his information and a sufficient excuse for not obtaining the affidavits of the informants.

Special Term, September, 1880.

MOTION to vacate attachment against property.

H. E. Farnsworth, for motion.

Blumensteil & Hirsch, opposed.

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McADAM, J. — The plaintiff alleges a cause of action for the recovery of \$1,534.75 for goods sold and delivered by him to the defendant at his request and at prices agreed upon. The breach assigned is the failure of the defendant to pay for the goods (*Salisbury agt. Stinson*, 10 *Hum*, 242). Thus we have the contract and its breach. The failure to allege, in the language of section 3169, subdivision 5 of the Code of Civil Procedure, that the defendant is an adult is not material. The law will presume that he is an adult; and what is presumed need not be otherwise proved in the first instance. The facts stated in the affidavit upon the affiant's information are made evidence where, as in this case, he gives the sources of his information and a sufficient excuse for not obtaining the affidavits of the informants. The defendant's foreman, Mr. Murphy, told the plaintiff that the defendant intended to make a general assignment, and that in order to prevent his property from being administered thereunder, he was selling and disposing of his goods without making any entries in his books. (1.) That he sold an item of \$234 to E. Foland & Co. in this way. (2.) That on September 7, 1880, he sent \$486 to his mother in Connecticut; and (3.) About the same time gave one Sommers, a pawnbroker, about \$600 in business paper. (4.) That the defendant had told him that he was going to ship away large quantities of goods. (5.) That the defendant has been collecting large amounts of accounts, and the week preceding the attachment collected \$1,000 from various parties. (6.) That he recently disposed of an interest in a mortgage; and all these acts are said to be in anticipation of a contemplated fraud upon creditors. These acts, susceptible of explanation or denial by the defendant (if untrue), are left unanswered and unexplained, and make out a *prima facie* case sufficient at least to call upon the defendant for some answer or explanation. The motion to vacate the attachment will, therefore, be denied with leave to renew upon affidavits.

Greensward agt. Union Dime Savings Institution.

SUPREME COURT.

JAMES H. GREENSWARD agt. UNION DIME SAVINGS INSTITUTION.

Restriction of examinations before trial — Motion to define and limit the scope of the examination — The proper course.

Where the main purpose of an examination of parties before trial, as disclosed by the affidavit on which the order for the examination was made, seemed to be designed to establish the ultimate fact of an indictable offense in which the plaintiff confesses himself guilty with the defendants:

Held, that it is not competent to compel the defendants to testify to any evidentiary fact, such as the execution of certain deeds and the like, which have a tendency to establish what might result in a criminal charge against them, or which will subject them to a penalty.

Parties to a suit have the right to be protected from inquiries of this kind, and the proper course to be pursued is by motion to limit the examination to legitimate matters rather than by objection to the several questions as they may be propounded, or by the advice of counsel to his clients that they are shielded by the statute from answering.

N. Y. Chambers, September, 1880.

JAMES H. GREENSWARD, a lawyer, sued the Union Dime Savings Institution and its trustees to recover \$5,000 for alleged services in taking care of eleven houses and lots in Forty-seventh street and Lexington avenue during two years from November, 1876. The plaintiff says that the savings bank purchased this property, on which it held first mortgages to a large amount, from the receiver and assignee in bankruptcy of the estate of Anson B. Birdsall; that the bank and its trustees desiring to have the title to the property taken in the name of some third person induced him to take such title, he giving back to the bank mortgages upon the property and a reconveyance of the title, the deed to him being recorded, while the deed by him to the bank was, by mutual agreement, withheld from record. The defendants, plaintiff alleges,

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promised to pay him for taking charge of and endeavoring to effect a sale of the property. The defense is that plaintiff, during the time mentioned, was in the employment, as clerk, of John H. V. Arnold, one of the defendants and counsel for the bank, and that whatever services plaintiff rendered were as such clerk and had been fully paid for; that the bank had surrendered to plaintiff the bonds and mortgages, and obtained from him a release of all claims in respect to this property. The plaintiff obtained from judge BEACH, in supreme court chambers, an order requiring three of the defendants, Napoleon J. Haines, Gardner S. Chapin and Aaron Close, to submit to an examination as parties before trial. Then the case came before judge MACOMBER upon a motion by defendants to define and limit the scope of the examination, it being claimed that plaintiff was precluded from examining the defendants as to any oral understanding in the matter, he having himself testified, in November, 1877, before William J. Best, bank examiner, that he had instructed Mr. Arnold to bid for the property for him at the sale of the bankrupt's estate; that fifty dollars was the amount of the bid, and that the purchase was not suggested by Arnold as a cover or blind to conceal the ownership, which was in the savings institution; that his idea was that if real estate went up there might be something in them, but since it had gone down he would give a deed to the bank for the houses.

S. C. Conable, for plaintiff.

William H. Arnoux, for defendants.

MACOMBER, J. — In granting the application, said: It cannot be permitted to the plaintiff to ask of the defendants on this examination any question which will tend to establish the fact as alleged in the complaint and in the plaintiff's affidavit, that the title to the lands mentioned was taken in the name of the plaintiff, and mortgages were executed by him to the

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corporation for the purpose of enabling the bank to pass a proper examination at the hands of the bank examiner. It has long been enacted by statute that a witness shall not be required to give any answer which will have a tendency to accuse himself of any crime or misdemeanor, or to expose him to any penalty or forfeiture (2 *Stat. at Large*, 422, *sec.* 71; *Code Civil Procedure*, *sec.* 837). The main purpose of the examination, as disclosed by the affidavit, seems to be designed to establish the ultimate fact of an indictable offense, in which the plaintiff confesses himself guilty with the defendants. It is clearly not competent to compel the defendants to testify to any evidentiary fact, such as the execution of the deeds and the like, which have a tendency to establish what might result in a criminal charge against them, or which will subject them to a penalty. I do not, of course, speak of what the truth is in the case as to the imputation made against the defendants. Parties to a suit, without reflection upon their integrity in making the objection, have the right to be protected from inquiries of the kind; and their counsel has, in my judgment, pursued the proper course by motion to limit the examination to legitimate matters, rather than by objection to the several questions as they may be propounded, and by advice to his clients that they are shielded by the statute from answering them. There may, perhaps, be some difficulty in defining so accurately as to cover all questions upon what subjects the defendants may be examined, but the foregoing does, I think, indicate sufficiently clearly for guidance of counsel the proper limitation of the examination.

Woodmansee *et al.* agt. Rodgers.

COURT OF APPEALS.

LUMAN WOODMANSEE *et al.*, appellants, agt. AMOS S. RODGERS,
respondent.

Attachment — Code of Civil Procedure, section 682 — What is an actual application of attached property under this section — Vacation of, by subsequent attaching creditor.

A mere levy under an execution is not such an actual application of the attached property or the proceeds thereof, under section 682 of the Code of Civil Procedure, as to bar the right of the subsequent lienor to move to vacate the same, as provided in this section.

The language of this section of the Code means an actual and real application of the property or its proceeds, as distinguished from a constructive one.

While the property remains, before it has been actually transferred to the plaintiff, or in case of sale, before its proceeds have gone to him, it is possible for the court to control and determine the liens upon it, fixing their order and enforcing their payment on the one hand, or discharging or removing them on the other (*Affirming S. C.*, 58 *How.*, 439).

September, 1880.

THE plaintiffs obtained an attachment against the property of the defendant on October twentieth. On the twenty-second they obtained judgment and levied execution. On the twenty-first of October, Weil Bros. levied an attachment. After judgment of plaintiffs, Weil Bros. moved to vacate the attachment of plaintiffs. The latter contended that the former were too late with the motion, as plaintiffs had levied an execution, which amounted to an actual application of the attached property to the payment of the judgment.

Judge BRADY, at special term (*see* 58 *How.*, 98), overruled this objection and set aside the attachment. This decision was sustained at general term in an opinion delivered by judge DAVIS (*see* 58 *How.*, 439), whereupon plaintiffs appealed to the court of appeals.

Woodmansee *et al.* agt. Rodgers.

Otto Howitz, for appellants.

Blumensteil & Hirsch, for respondent Weil Bros.

FINCH, J.—The plaintiffs obtained an attachment against the property of the defendant on the 20th day of October, 1879, and on the twenty-second of the same month perfected judgment in their action and issued execution, under and by virtue of which the sheriff levied upon the property of the defendant upon the same day.

The firm of Weil Bros. obtained a warrant of attachment against the property of the defendant, which is conceded to have been subsequent in point of time to that obtained by plaintiffs, although its date in the printed case is October 2, 1879. The date is probably a mistake, for the argument went upon a distinct concession, on both sides, that as against the plaintiff the firm of Weil Bros. were subsequent lienors.

On the 28th of October, 1879, the latter moved to vacate the plaintiffs' attachment, which motion was granted, and the order affirmed by the general term. The sole question presented here is whether, under section 682 of the Code, the subsequent lienors had the right to move in face of the fact that the defendant's property had already been levied upon by virtue of the plaintiffs' execution. The Code provides that the subsequent lienor may make the motion, "before the actual application of the attached property or the proceeds thereof to the payment of a judgment recovered in the action."

We think the conclusion of the general term — that a mere levy under an execution is not such actual application as to bar the right of the subsequent lienor to move — was correct. While a levy upon sufficient property has often been held to be payment of the debt, and to extinguish the judgment, it is only constructively so, and with reference to the equitable rights of others, and the judgment may nevertheless not be in fact paid. We think the language of the Code, in the sec-

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tion referred to, means an actual and real application of the property or its proceeds, as distinguished from a constructive one. The reason of the rule plainly leads in this direction. While the property remains, before it has been actually transferred to the plaintiff, or in case of sale, before its proceeds have gone to him, it is possible for the court to control and determine the liens upon it, fixing their order and enforcing their payment on the one hand, or discharging or removing them on the other. No evil can result, unless from a delay which has in fact transferred the property or its proceeds upon a lien fully and completely enforced. That evil was the one at which the provision of the section in question was aimed, and it does not exist where there is merely a levy under which neither the property nor its proceeds have actually and in fact passed to the creditor. That seems to us to be the true construction of the section, and it follows that the order should be affirmed.

All concur.

MONTGOMERY COUNTY COURT.

GEORGE SNYDER and JOHN CRANKER, respondents, agt. DANIEL SCHRAM, appellant.

Justices' courts — Constable's return — Power of justices of the peace as to amendments — Irregularities which will not affect a judgment — Officer de facto — his acts sustained.

Where, on appeal from a justice's judgment, it is alleged as error that the constable who served the summons was not a legal officer and that his return of the service is false, it is shown by affidavits that the person serving the summons has long been acting and recognized by the public as a constable and claims to be a legal officer and authorized to act as such:

Held, that, being a *de facto* constable his official acts, so far as the public and third persons are concerned, are just as valid and effectual as though he was an officer *de jure*, and his title and acts can only be questioned in a direct proceeding with him in which they were in issue.

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Where a justice's return on appeal shows that all the jurisdictional steps were taken necessary to a valid judgment before him; that he issued a summons which was served on the defendant by a constable personally, enough is stated to raise the presumption of the regularity as to the form of the summons and its due service. If any error occurred, it is the duty of the appellant to make it clearly appear to the court on appeal, as no presumption can be indulged in against the judgment.

Where the justice in his return certified that he issued and delivered the summons to the constable for service on the twenty-third, and on the same day it was duly returned to him by the constable with a return of personal service, the constable in his return certifying that he served the summons on the 3d day of January, 1880. From affidavits read it appeared that the summons was duly served and returned on January twenty-third. The date of service in the constable's return is not correct, and was inserted by him by mistake in neglecting to add the figure 2 just before the figure 3:

Held, that this is not fatal to the judgment.

Held, also, that ample power exists for amending the constable's return and correcting the irregularity therein. The justice had the authority to allow the amendment before or after judgment, and the amendment may be allowed now in furtherance of justice.

July 31, 1880.

J. D. & F. F. Wendell, for respondents.

R. J. Sanson, for appellant.

Z. S. WESTBROOK, *County Judge*. — This case comes up on an appeal taken by the defendant from a judgment recovered against him before A. D. Canning, Esq., a justice of the peace of the town of Minden, on January 30, 1880. It is alleged, as error, that the constable who served the summons was not a legal officer, and that his return of the service is false. These are assigned as errors of fact. The summons was dated and issued on January 23, 1880, and was made returnable on January thirtieth, at 9 o'clock A. M., and was in due form.

The justice in his return certifies that he issued and delivered the summons to the constable for service on the twenty-third, and on the same day it was duly returned to him by Henry

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Husen, a constable of Montgomery county, with a return of personal service. The following is the return of service indorsed on the summons :

“MONTGOMERY COUNTY, ss. :

I hereby certify that on the 3d day of January, 1880, I served the within summons on the within named defendant, Daniel Schram, by delivering to and leaving with him personally a true copy thereof.

HENRY HUSEN,
Constable.”

As to the objection that the officer who served the summons was not a legal constable, I don't think I can properly determine that question in this case. The justice in his return certifies that he is a constable, and the officer in his return of service also affirms it. The affidavits read by appellant raise some doubt as to his being a legal constable. But the affidavits read by the respondents' counsel show that he has long been acting and recognized by the public as a constable, and claims to be a legal officer and authorized to act as such. He was, therefore, a *de facto* officer, which is sufficient for all purposes in this case, and his return is conclusive. Being a *de facto* constable his official acts, so far as the public and third persons are concerned, are just as valid and effectual as though he was an officer *de jure*, and his title and acts could only be questioned in a direct proceeding with him in which they were in issue.

In the case of *Read agt. The City of Buffalo* (3 *Keyes*, 447), a justice of the peace heard and rendered judgment in the case after his term expired, claiming the right to continue to act. On an appeal in that case the judgment of the justice was sustained. Judge PORTER in delivering the opinion of the court of appeals (*page* 448), says : “It is unnecessary to determine the question whether the magistrate was right in retaining his place until the qualification of his successor. It is sufficient that he was an officer *de facto* discharging the

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duties of his position under color of legal title. His judicial acts, so far as they affected only the rights of third persons, were not subject to collateral impeachment on the ground that he was no longer a magistrate *de jure*."

In *Fowler agt. Bebee* (9 *Mass.*, 231) it was held that the defendant could not show that the person who served the writ on him was not a sheriff *de jure*.

The rule sustaining the official acts of officers *de facto* is founded on considerations of public policy, and its maintenance is essential to the preservation of order, the security of private rights and the due enforcement of the laws (*Parker agt. Barker*, 8 *Paige*, 428; *Weeks agt. Ellis*, 2 *Barb.*, 320; *Greenleaf agt. Low*, 4 *Denio*, 170; *Wilcox agt. Smith*, 5 *Wend.*, 233).

The next and more serious question is as to the irregularity in the constable's return of the service of the summons.

From the affidavits read it appears that the summons was duly served and returned on January twenty-third. The date of service in the constable's return is not correct, and was inserted by him by mistake in neglecting to add the figure 2 just before the figure 3. The appellant's counsel urges that this is fatal to the judgment.

It is true that the justice could only acquire jurisdiction of the person of the defendant by a proper return of the service (2 *vol. Wait's Law and Prac.*, 72).

The summons (a long one) must be served at least six days before the time of appearance mentioned therein (2 *R. S. [Edm. ed.]*, 243, *sec.* 15).

"The constable serving a summons shall return thereupon in writing the time and manner in which he executed the same and sign his name thereto" (*Ibid.*, *sec.* 16).

The constable's return must show the time and manner of service.

If it does not show any time when the summons was served the justice obtains no jurisdiction to proceed (*Wheeler agt. Lampman*, 14 *Johns.*, 481); and the constable's return must

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show that the summons was served six days before it is returnable. The time of service stated in the return is material to show that the summons was served six days before it is returnable (*Legg agt. Stillman*, 2 *Cow.*, 418; *Bromley agt. Smith*, 2 *Hill*, 517).

Justices are required to keep a book in which they shall enter the time when they issue a process against a defendant, and the title and other proceedings in each cause before them (2 *R. S. [Edm. ed.]*, 277, *sects.* 243, 244); and their dockets are evidence before them of the proceedings had in any cause (*Ibid*, *sec.* 245).

Where a justice's return on appeal shows that all the jurisdictional steps were taken necessary to a valid judgment before him, that he issued a summons which was served on the defendant by a constable personally, enough is stated to raise the presumption of the regularity as to the form of the summons and its due service. If any error occurred it is the duty of the appellant to make it clearly appear to the court on appeal, as no presumption can be indulged in against the judgment (*Potter agt. Whittaker*, 27 *How.*, 10, 13).

It is for the appellant to show that error has been committed to his prejudice. Appellate courts in reviewing cases heard and decided by justices of the peace uniformly regard them with great liberality and seek to sustain them by every reasonable and warrantable intendment (*Schoonmaker agt. Spencer*, 54 *N. Y.*, 366).

The constable's return of service does not show that the summons was not served six days before it was returnable. I think it fairly shows, especially in connection with the justice's own docket before him, that it was duly served six days before it was returnable. No presumption will be indulged against it. I cannot see how the defendant has been prejudiced by the constable's return.

I am of the opinion, also, that ample power exists for amending the constable's return and correcting the irregularity therein. The justice had the authority to allow the

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amendment before or after judgment; and the amendment may be allowed now in furtherance of justice (2 *R. S.*, 442 [*Edm. ed.*], *secs.* 1, 4, 5, 7, 8; *Code of Civil Proc.*, *sec.* 723; *Perry agt. Tynen*, 22 *Barb.*, 137).

Justices of the peace have the same powers as to amendments as courts of record (*Perry agt. Tynen*, *supra*, 139, and *cases therein cited*; *Talcott agt. Rozenberg*, 3 *Daly*, 208).

I have remitted the return in the case (though I don't regard it necessary) to the justice before whom the cause was tried to allow the constable to correct the informality in his return of service, and he has done so.

It is very doubtful if the notice of appeal is sufficient to raise any question, except as to whether the constable who served the summons was a legal officer. But with my views, as expressed, it is not important to pass upon the sufficiency of the notice.

The defendant has no merits. He deliberately absented himself on the return day of the summons.

The judgment is fully sustained by the evidence and undoubtedly is just.

If the defendant had any defense and any good excuse for his default he might have been relieved and permitted to come in and defend on a proper application.

I think the judgment should be affirmed.

Judgment accordingly affirmed, with costs.

Kohn agt. Burnett.

SUPREME COURT.

CHARLES KOHN agt. WILLIAM B. BURNETT.

Judgment as affecting order of arrest—Code of Civil Procedure, section 576.

Where the defendant was held on an order of arrest, a motion having been made upon affidavits to vacate the order of arrest, a reference was ordered, and pending the reference the action was tried and judgment was rendered for the amount of the debts and costs, the judge declining to hear evidence on the question of fraud. An execution having been issued against the person of defendant, a motion was made to set it aside:

Held, that the application was made in this case before judgment and in season. The judgment only determined the fact and amount of the defendant's indebtedness, and not necessarily what kind of execution may be issued to enforce it. The question whether the execution could be issued against the body could only be determined in this action by the existence of the order of arrest after the defendant had lost the right to move to vacate such order.

New York Chambers, July, 1880.

THE defendant was held on an order of arrest based upon false and fraudulent representations made at the time of contracting the debt, and the subsequent fraudulent disposition of his property. A motion having been made upon affidavits to vacate the order of arrest, a reference was ordered, and pending the hearing a stipulation was signed by the counsel on either side, that further evidence might be given on three days' notice. While the reference was pending the action was tried, and judgment rendered for the amount of the debt and costs. The judge declined to hear evidence on the question of fraud. An execution having been issued against the person of defendant, a motion was made at chambers to set it aside. The question was thus presented whether the judgment put an end to or formed a bar to the defendant's motion to vacate the order of arrest.

Simmons agt. Vanderbilt.

Abbett & Fuller, for plaintiff.

D. & T. McMahon, for defendant.

POTTER, J. — In his opinion, says that formerly “such was the effect of the judgment, but by an amendment of the Code of Procedure, section 183, the defendant has twenty days after service of the order to move to vacate the order (*Pilo* agt. *Clukey*, 36 *Howard*, 179). By section 576, Code of Civil Procedure, a defendant may apply to vacate an order of arrest at any time before final judgment. The application was made in this case before judgment and in season. The judgment only determined the fact and amount of the defendant’s indebtedness, and not necessarily what kind of execution may be issued to enforce it. The question whether the execution could be issued against the body could only be determined in this action by the existence of the order of arrest after the defendant had lost the right to move to vacate such order. The defendant has not expressly or impliedly consented to abandon his motion.” Judge POTTER denies the motion, unless defendant proceeds with the taking of evidence and concludes it within thirty days.

SUPREME COURT.

ZACHARIAH E. SIMMONS agt. CORNELIUS J. VANDERBILT.

Examination of parties before trial — What affidavit must state to justify an order for.

To justify an order to examine a defendant to enable a plaintiff to frame his pleading, the affidavit must make disclosure of what induced plaintiff to proceed; and the framing of a general averment is not sufficient.

First Department, General Term, September, 1880.

Before DAVIS, P. J., BRADY and BARRETT, JJ.

Simmons agt. Vanderbilt.

APPEAL from order vacating order for the examination of the defendant.

H. M. Whitehead, for appellant.

Lord & Lord, for respondent.

PER CURIAM. — Where a proper case has been made for it, a party has an undoubted right to examine his adversary to enable him to prepare his pleadings. But here the plaintiff's affidavit is entirely defective. It states no fact whatever, except that the defendant admitted "the receipt of the money sued for." The relations between the parties are undisclosed. The plaintiff gives us no insight into his real position; no clue to the averment that the moneys were received "for his use." Something should at least have transpired to justify the bringing of the suit and the framing of a general averment. So far the court should have been taken into the plaintiff's confidence. As it is, this affidavit is entirely blind. It seems studiously to avoid a frank disclosure of what induced the plaintiff to proceed. The order was, therefore, very properly vacated. It would be intolerable were parties to be subjected to inquisitorial examinations upon such papers.

The order appealed from should be affirmed, with ten dollars costs and the disbursements of the appeal.

The People *ex rel.* Egan agt. Justices of the Marine Court.

COURT OF APPEALS.

THE PEOPLE *ex rel.* CHARLES C. EGAN, executor, &c., respondent, agt. THE JUSTICES OF THE MARINE COURT OF THE CITY OF NEW YORK, appellants.

Marine court of the city of New York — may revive an action and continue it against an executor — Code of Civil Procedure, section 816.

When, during the pendency of an action in the marine court of the city of New York, the defendant dies, that court may direct the action to be revived and continued against his executors or administrators, and this notwithstanding the fact that the said court would have had no original jurisdiction against such representatives in the first instance. (*Overruling same case in 18 Hun, 388.*)

Decided September 21, 1880.

APPEAL from an order of the general term of the supreme court in the first department, affirming an order of the special term making absolute a writ prohibiting the marine court from acting under an order made by Mr. justice McADAM, one of the judges thereof, continuing an action against the legal representatives of a deceased defendant.

The facts sufficiently appear in the opinion.

M. & E. Jacobs, for marine court, and *Eli Long*, for plaintiffs in the original action, appellants.

C. C. Egan, attorney in person, for respondent.

RAPALLO, *J.* — The action against Mrs. Hazard, the relator's testatrix, was commenced in the marine court in November, 1874, and proceeded to trial and judgment in favor of the plaintiffs. An appeal was taken to the general term of the marine court and there argued on the 2d of January, 1878. On the 30th of January, 1878, and before any decision had

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been announced by the general term, Mrs. Hazard, the defendant, died.

Letters testamentary were, on the 12th of February, 1878, issued to C. O. Egan, Esq., the relator, as executor of the will of Mrs. Hazard. On notice to him a motion was made by the plaintiffs in the marine court, on the 26th of March, 1878, to continue the action against him as executor, which motion was opposed. An order was thereupon made by the marine court granting the motion.

The general term having in the meantime decided the appeal and entered an order reversing the judgment and granting a new trial, the plaintiffs, after the entry of the order continuing the action, took steps to bring it to trial, whereupon, on the application of Mr. Egan, the supreme court granted a writ of prohibition prohibiting the marine court from entertaining further jurisdiction of the action and enjoining the plaintiffs from further proceeding therein. The present appeal is from the order granting this writ.

The ground upon which the order was made is, that by the death of Mrs. Hazard the action abated and the marine court had no power or jurisdiction to revive or continue it against her executor.

From the time of its organization the marine court has been denied original jurisdiction in actions against executors and administrators. In the act of 1813, chapter 85, section 106, it was declared that it should have no jurisdiction of actions against executors and administrators as such. In the Code of 1848, section 58, it was declared that it should have jurisdiction in certain enumerated cases and no others. The first specification was "actions similar to those in which courts of justices of the peace have jurisdiction, provided by sections 46 and 47." By section 47 of the Code of 1848, it was provided that no justice of the peace should have cognizance of an action against an executor or administrator as such. This prohibition was thus made applicable to the marine court and has at no time been removed. The various acts of the legis-

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lature, from time to time passed since 1848, have added to the jurisdiction of the court in other respects, but none of them has ever made any change in this particular. But, notwithstanding this positive denial of jurisdiction to entertain actions originally brought against executors or administrators, the Code of 1848, section 8, expressly made applicable to actions in the marine and justices' courts, the provision of section 101 (now numbered 121), which declare that no action shall abate by the death, marriage or other disability of a party if the cause of action survive or continue, but that the court may allow the action to be continued by or against his representative. None of the amendments to the Code of 1848 have changed these provisions. Reading them in connection, the rule they established clearly was, that an action could not be brought in the marine court against an executor or administrator as such, but that if after having acquired jurisdiction in an action the defendant should die, the action should not abate, but might be continued against his representative. There is no inconsistency in these provisions. Under that Code the action now in question was brought. It is contended, however, by the relator that by the Code of 1877, the power of the court to continue the action was taken away.

The appellant makes several answers to this claim: First. That, assuming that the new Code contains provisions depriving the court of jurisdiction to continue actions in such case, such provisions are not applicable to pending actions, but only to those commenced after they took effect; that to make them applicable to pending actions, an express declaration that they were so intended was necessary, otherwise the law, as it existed when the action was commenced, must decide the rights of the parties, citing *Hitchcock agt. Way* (6 *Ad. & Ell.*, 884), and *Palmer agt. Conly* (4 *Den.*, 376). Without questioning the soundness of this position, I pass to the second point made by the respondent's counsel, which is that the new Code did not effect any change in respect to the power of the court to continue an action, of which it had acquired jurisdic-

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tion, in case of the death of one of the parties. The only provision claimed by the respondent to have that effect is section 316, subdivision 3, which declares that the marine court "has not jurisdiction of an action against an executor or administrator in his representative capacity." This is the same provision, in substance, which was contained in the act of 1813, and which was, in the Code of 1848, incorporated by reference in the section defining the jurisdiction of the marine court. But in the new Code, as in the old, this apparently positive prohibition is qualified by applying to the marine court provision that an action shall not abate by any event if the cause of action survives, but that in case of the death of a sole plaintiff or defendant the court must allow it to be continued against his representative. This provision for continuing actions is contained in chapter 8, title 4, sections 755, 756, 757 of the new Code. By the explanatory act accompanying the Code (*Laws of 1876, chap. 449, sec. 5, as amended by Laws of 1877, chap. 318, sec. 5*) it is enacted that the eighth chapter of the Code shall apply to proceedings taken after September 1, 1877, when the Code took effect, in the courts specified in subdivision 4 of the same section. The marine court of the city of New York is one of the courts named in subdivision 4. Thus we have a direct recognition of the authority of the marine court to continue an action against the representatives of a deceased party, and the law stands precisely as it did under the former Code. That it was not the intention of the Code to change by implication the existing laws relative to the jurisdiction and powers of the marine court, is apparent not only from the notes of the commissioners but from the explanatory act (*Laws of 1876, chap. 449, sec. 7, subd. 1*). It would seem sufficiently plain from the provisions already cited that the power to revive an action on the death of a party was not intended to be abrogated, but to put the matter beyond cavil an amendment was made, in 1879, to section 316, subdivision 3, declaring that that subdivision did not prevent the court from continuing an action against

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the representatives of a deceased defendant. This amendment was simply declaratory and made no new law. The application of the provisions for reviving actions to actions in the marine court had the same legal effect.

The point taken by the relator that the decision of the marine court, general, term awarding a new trial not having been rendered until after the death of Mrs. Hazard, was absolutely void under section 765 of the Code, is not, even if well taken, available on this appeal. The writ of prohibition absolutely prohibits the court from entertaining further jurisdiction in the cause. This cannot be sustained even if the appeal to the general term of the marine court should be regarded as still undecided.

The order allowing the writ affects, we think, a substantial right. It determines the action by precluding any further proceeding therein and deprives the plaintiffs of a legal right. We think it is appealable to this court.

The orders of the general and special terms should be reversed without costs.

“All concur, except FOLGER, Ch. J., not voting.”

SUPREME COURT.

THE PEOPLE *ex rel.* EDWARD G. GILMORE, appellant, agt.
CHARLES DONOHUE, a justice, etc.

THE PEOPLE *ex rel.* JOHN SMITH, appellant, agt. CHARLES
DONOHUE, a justice, etc.

Contempt—When proceedings to be deemed to have been terminated, for the purposes of review.

Where a final order has been made convicting a person of contempt and pronouncing upon him judgment of fine and imprisonment, the proceedings are, for the purposes of review, to be deemed to have been terminated.

First Department, General Term, September, 1880.

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APPEAL from orders quashing writs of *certiorari*.

A. J. Dittenhoefer, for appellant.

L. L. Delafield, for respondent.

BARRETT, *J.* — The writs of *certiorari* were quashed below upon a misunderstanding of what was decided in *The People* agt. *Peabody* (5 *Abb.*, 194), and *Devlin* agt. *Platt* (11 *Abb.*, 398). These cases undoubtedly support the familiar rule that the writ does not lie until the proceedings are terminated. But the precise question now involved did not arise. Here the final judgment has been pronounced, formulated, signed and entered of record. Nothing whatever remains to be done. We think that for the purposes of a review, the proceedings must be deemed to have been terminated by the final order convicting the relators of contempt and pronouncing upon them the judgment of fine and imprisonment. The warrant which follows is analogous to the execution issued upon an ordinary judgment. Here the appeal is from the process issued to enforce it. As the writs were quashed upon the sole ground that they would not lie until the warrants had been issued, we need not now consider any other point. The question whether *certiorari* is the proper remedy may therefore be properly reserved until the hearing before us upon the writs.

The order quashing the writs should be reversed and the writs reinstated.

Peck agt. New York and New Jersey Railway Company.

SUPREME COURT.

PECK, trustee, agt. THE NEW YORK AND NEW JERSEY RAILWAY COMPANY.

DEMAREST, trustee, agt. SAME.

Railroad foreclosure — Computation of amount due — What must be shown to sustain averment of inadequacy of price — Void order.

Where, in a foreclosure of a railway mortgage, bonds are outstanding and pledged as collateral, it is not error for the referee to compute, to include them in his estimate of the amount due.

A person obtaining a void order cannot use it to excuse the laches caused by trusting to it.

An order vacating an order is a judicial authority that it should not have been granted.

Second Department, General Term, September, 1880.

Clarkson N. Potter, for appellants.

H. W. Brewster and *Charles B. Alexander*, for respondents.

DYKMAN, J. — The plaintiffs in these actions are trustees for the holders of the mortgage bonds issued by the defendant and a company to whose rights and obligations it has succeeded. These actions were brought to foreclose the mortgages made to secure the bonds and proceeded to a sale. A holder of several of these bonds moved, at special term, to set aside the sale and presented three grounds to the consideration of the court: 1st. Error of law by the referee to compute whereby an excessive amount was reported due. 2d. Inadequacy of price. 3d. Surprise or mistake preventing his presence at the sale.

A number of the bonds were pledged as collateral to debts

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of the company by it before their regular issue. These were included in the referee's computation.

The appellant contends that these never had a legal inception. The respondents' answer is, that the company having failed to pay the pledges have sold, and the liability of the company becomes fixed. That this is true of some is shown by the appellant's petition showing title to a part of his bonds thus gained. Such eventual disposition of all bonds pledged was natural and properly provided for. The appellant had an order staying the sale. This was vacated on the day of the sale, and he pleads that relying on this order he made no preparation to attend the sale, and learning it had been vacated too late he was not present. The order vacating was an adjudication that the order should not have been granted in the first instance. This court will not interfere to throw the loss on the party improperly restrained and give the appellant advantage of this wrong (*La Farge* agt. *Van Wagenen*, 14 *How. Pr.*, 54).

We do not think inadequacy of consideration established; but if it were the disposition we have made of the other points would leave it standing alone and would require such inadequacy as "would shock the conscience and amount, in itself, to conclusive and decisive evidence of fraud" (*Story Eq. Juris.*, sec. 246).

The order should be affirmed.

Anderson agt. Speers.

SUPREME COURT.

ROBERT J. ANDERSON, respondent, agt. HENRY S. SPEERS,
appellant.

Parties — Who are proper parties in action against trustee of manufacturing company to enforce a personal liability for permitting the indebtedness of the company to exceed its capital stock.

In an action against the trustee of a manufacturing company, to enforce a personal liability for permitting the indebtedness of the company to exceed its capital stock, all the creditors of the company must be joined. In such an action, an accounting will be necessary to determine who are creditors of the company and the ratable manner in which the excess should be distributed among them.

First Department, General Term, May, 1880.

APPEAL from judgment overruling demurrer to the third cause of action contained in the complaint.

D. S. Ritterband and Michael H. Cardozo, for appellant.

W. W. Niles, for respondent.

DANIELS, J. — That part of the complaint demurred to in this case sets forth the facts that the American Shovel Company, of which the defendant was one of the trustees, with his assent contracted debts in excess to its capital, to the amount of \$38,629.30. The indebtedness of the plaintiff, together with interest and expenses, was near the sum of \$7,000, which left the residue of about \$30,000, for which the defendant would be still liable, after the payment of the plaintiff's demands, to the other creditors of the corporation; and it was for the non-joinder of these creditors as parties to the action, or the failure of the plaintiff to bring the action in his own behalf, and on behalf of the other creditors of the

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corporation, that the demurrer was interposed. It was held at the special term that it was unnecessary for the plaintiff to bring his action in either of the forms indicated; and whether that determination was right or not is the point upon which the disposition of this appeal depends. The statute applicable to the case provides that if the indebtedness of the company shall at any time exceed the amount of its capital stock, its trustees assenting thereto shall be personally and individually liable for the excess to the creditors of the company (2 *R. S.* [5th ed.], 508, sec. 58). The provision upon this subject is literally the same as that contained in an act of congress relating to similar corporations formed in the District of Columbia (16 *U. S. Stat. at Large*, 98, sec. 4), under which it has been held that an individual creditor of the company cannot maintain an action in his own behalf for the recovery of his own debt against the officers assenting to the unlawful increase of the company's indebtedness (*Horner agt. Henning*, 93 *U. S.*, 228). A provision precisely the same is contained in the laws of the state of Illinois (*R. S. Stat. of Ill.*, 228); and under that it has also been held that an action by one creditor on his own behalf alone cannot be sustained (*Buchanan agt. Bartow Iron Co.*, 3 *Bradwell*, 191). A similar point has also been decided in the state of Massachusetts in the case of *Merchants' Bank of Newburyport agt. Stephenson* (10 *Gray*, 232). The statute which was the subject of construction in the last case was much more favorable than either of these other acts to the right of one creditor to maintain an action simply for the recovery of his own debt, but the court felt itself controlled in the construction which was given to it by other provisions of the act, and held that the other creditors should be made parties either directly or theoretically, and that an action in equity alone could be maintained. In this respect the decision was the same as that made in the case of *Horner agt. Henning* (*supra*). It has been urged, in support of the plaintiff's action, that a different rule of construction has been adopted by the authorities existing in this state. But no case

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has been cited, neither has any been discovered, in which an action in this form has been held proper under the section of the statute already mentioned. The cases relied upon have all arisen from other provisions of the same or other statutes which, by their terms, render the officers and stockholders in default, jointly and severally, for all the debts of the company. This is the case as to the trustees who may fail to make and publish the annual report required, or who may declare a dividend when the company is insolvent, or which, of itself, would render it insolvent or diminish its capital stock, or for making a report which shall be false in any of its material representations (2 *R. S.* [6th ed.], 506, 507, *secs.* 47, 48 and 50). The provision is, in form, the same which declares the liability of stockholders for the debts and contracts of the company previous to the full payment of its capital stock, and to laborers, servants and apprentices for services performed for the company (*Id.*, 504, *sec.* 38; 507, *sec.* 58). There is a very evident distinction between these several provisions and the one upon which this cause of action has been predicated, for as they render the stockholders and trustees, in the cases provided for, jointly and severally liable for all the debts of the company at the time existing, there can be no impropriety in allowing each one of the creditors to maintain an action in his own behalf for the recovery of the debt due to himself. The liability provided for by these sections is several and individual in its character, including all the debts owing at the time by the company. For that reason no special necessity exists for requiring other creditors to be joined, but each may properly prosecute an action for the recovery of the amount due to himself. No injustice can result from proceeding in that manner where the persons proceeded against are liable for all the existing debts of the corporation; and for that reason it has been held that the action may be maintained under provisions of this nature by each creditor in his own behalf (*Bank of Poughkeepsie agt. Ibbotson*, 24 *Wend.*, 473; *Van Kork agt. Whitlock*, 3 *Paige*,

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409; *Burr* agt. *Wilcox*, 22 *N. Y.*, 551; *Shellington* agt. *Howland*, 53 *N. Y.*, 371; *Boynton* agt. *Hatch*, 47 *N. Y.*, 225; *Garrison* agt. *Howe*, 17 *N. Y.*, 458; *Mathez* agt. *Neidig*, 72 *N. Y.*, 100).

These were all actions against stockholders, either under the provisions of this statute or others of a similar nature, and it was held that each creditor might prosecute the stockholders liable, for himself individually.

Wiles agt. *Suydam* (17 *N. Y. Sup. Ct. Rep.*, 578), has been especially relied upon as an authority supporting the action brought by the plaintiff in this instance, but as it was against the trustee to enforce the liability created by the omission to make the annual report required by the statute, it can afford the plaintiff no assistance; for, as it has already been stated, the trustees for such an omission are liable for all the debts of the company then existing or contracted before the report may be made. The cases of *Chambers* agt. *Lewis* (28 *N. Y.*, 454) and *Jones* agt. *Barlow* (62 *N. Y.*, 262) were also dependent upon the same provision, and for that reason do not sustain the cause of action assailed by this demurrer.

The provision of the statute which has been set forth, and on which this action depends, does not render the trustees assenting to the unlawful increase of the company's indebtedness liable for all the debts of the corporation, as these other provisions have done, but it has declared them liable only to the extent of the excess of the indebtedness over the amount of the capital stock of the company, and then not to the creditors individually, but in terms to the creditors of the company collectively and as a mass. The provisions are clearly distinguishable, both in their terms and effect. One class includes all the debts existing against the company, while the other, by its terms, substantially creates a fund to the extent only of the unlawful excess of indebtedness, in the distribution of which all the creditors are ratably entitled to participate. An action brought in any form under this provision will require an accounting for the purpose of ascertaining

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who may be the creditors of the company, and to what extent it may be indebted to each individual, and for the purpose also of discovering what may be the excess of the indebtedness beyond the capital stock, and the ratable manner in which it should be distributed among such creditors.

Whether the action may be brought by one person or by all the creditors together, or by one on behalf of himself and the other creditors of the company, the proceedings must be substantially the same, for no individual creditor can recover more than the proportional amount of the excess of the indebtedness applicable to his own debt. In any event, a full investigation and accounting will be necessary to determine the rights of the parties.

For these reasons, the authorities construing a similar provision existing in other states, and in the District of Columbia, should be followed in the disposition of this appeal. That may be properly done, because they in no manner conflict with the cases already decided by the courts of this state, and they seem to be well sustained in the principle maintained behind them by the peculiar language of this section of the statute.

The judgment should, accordingly, be reversed, and an order entered sustaining the defendant's demurrer, with leave to the plaintiff to amend in twenty days on the usual terms.

DAVIS, P. J., and BARRETT, J., concur.

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SUPREME COURT.

MARCUS T. HUN, as receiver of the Central Park Savings Bank,
respondent, agt. JOHN G. CARY *et al.*, appellants.

*Savings banks—Liability of trustees for damages caused by their misconduct—
discharge in bankruptcy—A claim for unliquidated damages arising
solely from a tort not provable in bankruptcy.*

Trustees of a savings bank are liable for damages caused by their misconduct in the management of the affairs of the bank.

Where the proof showed that the bank was substantially insolvent, owing its depositors over \$70,000, and its assets were entirely insufficient in amount and in an unsatisfactory shape to meet any sudden or unusual call. In this condition of affairs the trustees authorized the purchase of four lots, at the cost of \$74,500, obligating themselves to build a building on one of the lots to cost \$25,000:

Held, that such a state of affairs justified a finding by the jury that this was not a case of mere error or mistake of judgment on the part of the trustees, but that it was a case of improvidence, of reckless, unreasonable extravagance, in which the trustees failed in that measure of reasonable prudence, care and skill which the law requires, and imposes liability upon them for loss thereby occasioned.

Certain of the defendants pleaded a discharge in bankruptcy:

Held, that they were not relieved thereby. The cause of action was for unliquidated damages arising solely from a tort. Such a claim is not provable against the bankrupt estate.

As to one of the defendants, Philip Smith, there was no evidence, other than the minutes, of his attendance at the meeting which authorized the purchase; he, himself, denied such attendance in the most positive terms and asserted his entire ignorance of the transaction until after it was closed:

Held, that this entitled him to a dismissal of the complaint, that he was not liable because of his subsequent inaction.

First Department, General Term, January, 1880.

APPEAL from a judgment entered upon the verdict of a jury and from an order denying the defendant's motion for a new trial.

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E. Ellery Anderson, for appellant.

Frederick H. Man, for appellants Gearty and Hoffman.

Abram Wakeman, for appellant Philip Smith.

Francis E. Barlow, for respondent.

BARRETT, J. — (1.) The charge against these trustees is not improvidence in the terms of the purchase, but dereliction of duty in buying the land at all.

The question is, whether the statutory power to invest in a suitable lot and banking-house was abused.

The bank had never been successful. From the first the annual payments exceeded the receipts. In 1871 there was a change for the better, but in 1872 the receipts again fell behind, and at the time of the purchase there was a deficiency of several thousand dollars, represented in part by the safe and fixtures.

It is not too much to say that the bank at this time was substantially insolvent. It owed its depositors over \$70,000, and its assets, apart from their insufficiency in amount, were in an unsatisfactory shape to meet any sudden or unusual call. One item consisted of a \$40,000 mortgage upon No. 15 West Forty-seventh street, in this city, another of \$5,500 on property in Brooklyn. Upwards of \$3,000 was out on call to persons whose names did not appear upon the books. The actual cash on hand amounted to but something over \$13,000. In this condition of affairs the trustees authorized the purchase of four lots, three more than were necessary, for \$74,500.

Of this sum, \$10,000 was to be paid upon the delivery of the deed, and the balance in two years' mortgage, with privilege of renewal for four years more.

This latter privilege, however, was conditioned upon the erection of a building worth at least \$25,000 upon the corner lot.

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It seems to us, as it must have to the jury, that this, under the circumstances, was an extraordinary transaction. It was proposed to withdraw \$10,000 at once from the very meagre cash resources of the bank, leaving less than \$4,000 in addition to the not fully exposed call loans and some other trifles, to meet the current demands of over 1,000 depositors aggregating \$70,433.77. A large interest and tax account was also to be thrown upon the bank besides the burden of either paying off the mortgages in two years, or of raising the funds to erect a \$25,000 building. All this with nothing save a small business and a yearly deficit to look back upon.

To talk of this as a mere error of judgment is idle. It was the height of imprudence. It exhibited a thoroughly rash and purely speculative spirit. No man of ordinary prudence would have thought of acting thus in his own affairs.

Had it reached the ears of the depositors an immediate run upon the bank would have been entirely natural and probable.

The explanation given by the trustees are wholly unsatisfactory. Their place of business was, they say, unattractive and unsafe, very good reasons for a change, but not for *this* change, for renting a more suitable *but always appropriate* banking-house; not for a purchase out of all keeping with their condition and surroundings.

And further, the force of these explanations is very much weakened by the absence of *immediate necessity*, as evidenced by the delay thereafter of nearly two years before proceeding to build.

It is true that the corner lot could only be secured by taking the plot and that the three unnecessary lots were afterwards well sold. But the trustees had no right to violate the law. The fact that no loss ensued does not render the act praiseworthy. It simply eliminates the penalty. Trustees must not be wiser than the law. But treat the transaction as in effect an authorized purchase of a single lot for \$29,250 and the result is the same. It is only a difference in degree. Such a purchase was entirely inappropriate and cannot be

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regarded as within any reasonable definition of enterprise. It was competent for the jury to pronounce it, as by their verdict they have done, a reckless hazarding of the depositors' interests upon the mere chance of success, upon the bare possibility of securing expansion combined with confidence.

We have alluded to the proofs thus fully for the reason that the case presents, in the main, only questions of fact. The charge of the learned judge was not unfavorable to the defendant. He submitted the case fairly, clearly, and with much fullness of illustration, substantially as directed by this court on a previous appeal. There was no exception to his instructions as to the pre-requisites to legal liability. The verdict which followed was amply supported by the evidence and must be sustained.

(2.) Certain of the defendants pleaded a discharge in bankruptcy. It was held that they were not relieved thereby. We think this ruling was correct. The claim was not provable against the bankrupt's estate. The cause of action was for unliquidated damages arising solely from a tort. There is a class of cases where demands in form *ex delicto*, but founded upon contract, are discharged (*Campbell agt. Perkins*, 8 N. Y., 430). This is upon the principle that a contract may be implied from the legal duty. Here, however, the action is not founded upon a contract, either expressed or implied, but solely upon the misfeasance. It is argued that the obligation of the trustees is based upon their having received the depositors' money under an implied agreement to preserve and restore it. This is an inaccurate view of the legal relations of the trustees to the depositors, and of the principle upon which the liability rests. The trustees did not receive the depositors' money nor did they agree, either expressly or by implication, to return it. This the bank did.

The general direction and management of the corporation are confided to the trustees. To all parties concerned they owe fidelity and vigilance. If they fail in these particulars, they fail in their duty, not in the performance of any con-

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tract obligation. The defendants do not distinguish between the contract relation in its legal aspect and the implied obligation in an ethical sense which rests upon every one to do his duty in all the relations of life.

In the case of an officer or agent of the corporation who has actually received and misapplied specific sums, there is a genuine instance of an implied contract to restore the money. Indeed, an action for money had and received would lie, notwithstanding the tort element. There the claim is clearly provable (*See In re Baxter*, 18 N. B. R., 62). From such a demand the bankrupt is released, unless the case comes within the exceptions.

(3.) A different question arises with respect to the defendant Philip Smith. There was no evidence, other than the minutes, of his attendance at the meeting which authorized the purchase. He, himself, denied such attendance in the most positive terms and asserted his entire ignorance of the transaction until after it was closed. We think this entitled Mr. Smith to a dismissal of the complaint. There was no conflict of evidence and nothing to go to the jury. If the secretary or any one else had testified to Mr. Smith's attendance, that, of course, would have involved a conflict. But the *prima facie* case made by the secretary's unsworn declaration contained in the minutes was absolutely overthrown by Mr. Smith's testimony; that is, unless such testimony is to be disregarded. But it cannot be disregarded by either court or jury, for it was not impaired on cross-examination, nor was Mr. Smith's credibility in anywise impeached or affected. Nor is he liable because of his subsequent inaction. Such inaction is not in fact the charge made against him. But even if it were, what could he do? The transaction was executed and completed. It was authorized by law. It was valid as between grantor and grantee. He could not have had it rescinded or set aside. A different question would have been presented if it had been *ultra vires* or fraudulent. It might then be urged that a trustee is bound to see to it that

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the corporate moneys are not dissipated in violation of statutory inhibition. But he cannot be expected to follow up every negligent act which transpires in his absence, especially where he is powerless to remedy the evil, and his protest would be a mere *brutum fulmen*.

(4.) The \$2,000 paid by Messrs. Lauterback & Hornthal should have been allowed. It sufficiently appeared that it was paid on the present claim. A plea was unnecessary. The effect of the payment was to reduce the damages *pro tanto*. If the amount was not in reality paid on this claim, the plaintiff should have proved the actual fact. Upon the evidence before us it would be manifestly unjust to permit the plaintiff to recover all the damages which, in the opinion of the jury, was sustained, and \$2,000 besides.

It was error to refuse the charge, as requested, "that if any damages were given the \$2,000 must be deducted."

The judgment must, therefore, be reversed and a new trial ordered absolutely as to Philip Smith, with costs to abide the event.

As to all the other defendants the judgments must also be reversed and a new trial ordered, with costs to abide the event, unless the plaintiff within ten days stipulate to reduce the judgment by deducting therefrom \$2,100 and interest, being \$2,000 from the verdict and \$100 from the extra allowance.

In case such stipulation be given the judgment, as thus reduced, is affirmed without costs of this appeal.

I concur, N. D.

Hasler agt. Johnston.

N. Y. MARINE COURT.

EDWARD HASLER, landlord, agt. SUSAN B. JOHNSTON.

Summary proceedings to recover the possession of real property — Non-resident landlord not required to file security for costs — Code of Civil Procedure, section 3279.

In summary proceedings to recover the possession of real property, a landlord being a non-resident, but owning property in the city and county of New York, cannot be required to file security for costs.

This proceeding is not "such a special proceeding instituted in a court of record" as is contemplated by section 3279 of the Code of Civil Procedure.

Special Term, September, 1880.

McADAM, J. — The tenant applies, under section 3279 of the Code of Civil Procedure, for an order requiring the landlord, who is said to be a non-resident, to file security for costs and for a stay of all proceedings until the same be fully perfected and approved. The proposed order to show cause is made returnable on the 21st of September, 1880, at 11 A. M., while the precept under which the tenant is summoned before me is returnable to-morrow morning (the eleventh instant). Section 3279 provides that the provisions of the statute in regard to security for costs shall apply to a special proceeding instituted in a court of record in like manner as to an action.

The question presented, therefore, reduces itself to this, is the present such a special proceeding instituted in a court of record as is contemplated by said section? The provision of the title (2) conferring jurisdiction of summary proceedings grants power to the district courts of the city of New York, but in every other instance confers it upon certain officers therein specified. For example, if the property be situated in the city of New York the application may be made to the city judge, or judge of the court of general sessions or to a justice of the marine court of the city of New York.

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The precept in such an instance is to be issued by one of the magistrates named, and the proceedings are to be conducted by the magistrates as such. In the district courts the precept is to be issued by the clerks thereof, and the justices of the district courts are to dispose of such proceedings as they hear and determine ordinary civil actions in their respective courts. Section 2265 provides that the proceedings before such magistrates shall not be stayed either before or after judgment, except as therein provided; and a stay until security for costs is filed is not one of the cases provided for by said section. Section 3272, in reference to security for costs, on the other hand, authorizes a stay until the security be given, or a special deposit of \$250 in lieu thereof be made.

In summary proceedings the costs allowable to a tenant can, in no event, exceed ten dollars and disbursements (*Code of Civil Procedure, sec. 2250*). Can it be possible, therefore, that the legislature intended to stay the summary proceedings of the landlord (who is, in most instances, the owner of the property) until he deposits \$250 in court to secure the tenant (if successful) the payment of ten dollars costs, or unless he gives an undertaking in \$250 to secure the payment of the same. These proceedings were intended to be, as expressed in the title of the statute, summary in their nature; and the various sections of the act relating thereto are repugnant to those in reference to security for costs, so that the one cannot be made to apply to the other (*See, also, sec. 2248*). The district courts may award to a successful tenant the same amount of costs which a justice of the marine court may award (*sec. 2250*), and yet no security for costs can be required in the district courts. Will it be seriously contended that while a stay on security for costs is denied in the district court, that the legislature intended that it should (under precisely similar circumstances) be granted in like proceedings commenced before a marine court justice? I think not. The application for the order to show cause and for a stay will, therefore, be denied.

Thompson agt. Hickey.

SUPREME COURT.

ANDREW J. THOMPSON agt. WILLIAM HICKEY and others.

Mortgage upon a cemetery lot — When invalid.

Where a person has taken a conveyance of a burial lot, and has made interments therein of the dead of his family, it is in such condition that it cannot be mortgaged to secure the payment of a debt or the return of money borrowed.

Special Term, June, 1880.

THE plaintiff being the owner of a small plot of ground in Greenwood cemetery, in which the bodies of three of his children were buried, borrowed of the defendant Hickey, a small sum of money, and as security for its return gave to Hickey a conveyance of the lot. The defendant Hickey, afterwards, without notice to the plaintiff, conveyed the lot to the defendant Farnham, who subsequently sold and conveyed it to the defendant Clark. The plaintiff was then called upon to remove the bodies of his buried children, with a threat from one of the defendants that if the plaintiff refused, the defendant would.

This action for an injunction and equitable relief was then brought.

John T. McGowan, for plaintiff.

Charles Bradshaw, for defendant.

VAN VORST, J. — The evidence clearly enough shows that the conveyance made by the plaintiff to the defendant Hickey, of the burial plot, was intended as security only for the repayment of the moneys loaned; and although it is absolute in form, it was a mortgage security only, which character it has not lost, and as such it must be considered (*Horn agt. Keteltas*, 46 N. Y., 605).

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The right of the plaintiff as mortgagor, could not be divested by the private sale made by Hickey to Farnham, and by the latter to Clark (*Lawrence agt. The Farmers' Loan & Trust Co.*, 13 N. Y., 200). Neither Hickey nor his immediate grantee could give any better right or interest than they really took. Besides, Clark, when he was asked on the trial as to his knowledge of the original transaction between plaintiff and Hickey, and as to its being a loan of money, replied, "in writing I never heard of it." A fair implication arises from the qualification, that he had otherwise heard of it, and that would be sufficient to put him upon inquiry. Hickey conveyed to Farnham for the nominal consideration of one dollar, and on the same day Farnham conveyed to Clark for the consideration of \$225, but Clark held back part of the price until the bodies of the plaintiff's children should be removed. The whole transaction between Hickey and the other defendants wears a suspicious appearance, which the evidence does not remove, and suggests a plan to deprive the plaintiff of the burial plot unjustly and without notice. But I apprehend that there are sufficient reasons in law and equity to prevent the consummation of the wrong.

The Greenwood Cemetery Association was incorporated for the purpose of establishing a burial ground, and for this purpose it was authorized to acquire a tract of land within the limits of the city of Brooklyn. The corporation was authorized to sell the grounds in lots or plots, to be used exclusively as a place of burial of the dead (*See the original act of April 18, 1839, and the several acts amending same*). There does not appear in the charter of this corporation, in terms, any absolute restraint upon the power of voluntary alienation of a cemetery lot by an owner. Yet I am persuaded that when a person has taken a conveyance of a burial lot, and has made interments therein of the dead of his family, it is in such condition that it cannot be mortgaged to secure the payment of a debt or the return of money borrowed. Such an act is prohibited by the equity and true spirit of the statute. For,

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observe how careful the legislature has been to secure the sleep of the dead from disturbance. The cemetery itself is exempted from public taxation, and the lots or plots of ground, when conveyed, are declared to be exempt from assessment, and cannot be sold on execution, or be applied to the payment of debts under any insolvent law. And as no public road, street or avenue shall be laid out or opened over the land, the same would seem to be absolutely secured against invasion. A mortgage, equally with an execution upon a judgment, might in the end expose the lot for sale. And although the letter of the charter under consideration is not so full, yet the legislature has clearly expressed its mind upon this precise subject in the provisions contained in chapter 133 of the Laws of 1847, entitled "An act authorizing the incorporation of rural cemeteries." By section 11 of that act, it is provided that when plots or lots shall be transferred to individual holders, and after there shall have been an interment in a lot or plot so transferred to individual owners, such lot or plot, from the time of such interment shall be forever thereafter inalienable, and shall, upon the death of the holder or proprietor thereof, descend to the heirs-at-law of such holder or proprietor, and to their heirs-at-law forever; and chapter 310 of the Laws of 1879 declares that it shall not be lawful to mortgage land used for cemetery purposes, or to apply it in payment of debts.

Legislation upon this subject has been in accord with the sentiments of humanity, and with the spirit of our civilization, and has shown a considerate regard for the sanctity of the burial places of the dead. By the incorporation of cemeteries, and their preservation as such, it has secured an immunity from disturbance for the dead which could not be obtained through burials in church-yards, which were liable to be unsettled by the sale of the church property.

When the case of *Lantz agt. Buckingham* was before Mr. justice BRADY at special term, he distinctly pronounced against the legality of a mortgage executed upon a cemetery lot by

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the proprietor thereof. He says, "regarding it in the light of a mortgage security, I think it is not to be sustained. It is against good morals, and therefore against the policy of the law, to encourage such instruments" (11 *Abb. R. [N.S.]*, 64). It is true that the judgment of the special term was reversed at the general term (*Lantz agt. Buckingham*, 4 *Lans.*, 484). But it is to be borne in mind that in that case no interment had been made in the lot at the time the mortgage was given, and it may be that it might not be considered an offense, either against good morals, public policy, or against the spirit of the statute, to convey or mortgage a cemetery lot before an interment had been actually made therein. For such a sale or conveyance satisfactory reasons might possibly exist. A man might desire to change his lot for one larger or more eligible. I do not regard the act of April 5, 1850, as affecting the question we are now considering. It declares under what circumstances a lot is inalienable. It does not authorize a mortgage or a sale thereunder by implication even.

But that it is an offense against good morals to mortgage a small isolated plot of ground in a cemetery, dedicated exclusively, under the sanctions of the law, as a sanctuary for the dead of one's family, and already consecrated by the ashes of one's kindred, I am sure cannot be well questioned. Such a transaction is clearly a breach of the policy of the statute, is contrary to its equity, and is within the evils it was designed to cure, and our moral nature protests against it. As a consequence of such a transaction, we have here a stranger calling upon a father to disinter his three children, who have been buried for a period of ten years in a cemetery lot, with a threat that if the parent will not, he himself will do it. And suppose he carries his threat into execution, what then? Sepulture must, in the end, be had, and that, it is believed, the statute was intended to secure permanently against disturbance from any such cause as is indicated by the mortgage in question.

The sentiments and feelings which people in a Christian

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state have for the dead the law regards and respects, and however it may have been anterior to our legislation on the subject of cemeteries, the dead themselves now have rights which are committed to the living to protect, and in doing which they obtain security for the undisturbed rest of their own remains. In any view which may be taken of this subject I am sure that the defendant should be restrained from interfering with the children's graves. If the conveyance executed by the plaintiff to Hickey, although it be in form absolute, is supposed to confer any present right, it must yield to the easement of the bodies already buried there, which should, in no event, be disturbed (*Morehead agt. Richardson*, 22 *Beaven*, 596; *S. C.*, 24 *Beaven*, 33; *First Presbyterian Church agt. Second Presbyterian Church*, 2 *Brewster* [*Penn.*], 372).

But, as has been already decided, the conveyance to Hickey was a mortgage security only, and until the plaintiff's rights have been judiciously ended through a proceeding in court, his complete possession and control of the lot cannot be interfered with; and for that reason, also, the threatened acts should be restrained, and a suit in equity is a proper proceeding to secure such restraint.

In *Kurtz agt. Beaty and another* (2 *Peters*, 566, 584) judge STORY says: "It is a case where no action at law could afford an adequate and complete remedy. The remedy must be sought, if at all, in the protecting power of a court of chancery, operating by its injunction to preserve the repose of the ashes of the dead and the religious sensibility of the living."

Taking up dead bodies from the place where they have been interred, without authority, is a misdemeanor at common law (*Stephens' Comm.*, vol. 4, 371; *Reg. agt. Twiss*, 10 *Best & Smith*, 298; see, also, paper of Mr. R. S. Guernsey, read before *N. Y. Medico-Legal Society*, Feb. 4, 1880, on the "*Law of Burial*").

But, in addition to relief by injunction, I am of opinion that it should be adjudged, for the reasons above stated, that the

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transfer made by the plaintiff to Hickey of the cemetery lot as security for a loan of money was, and is, void, and that the subsequent transfers to the other defendants are also void, and that they should severally be delivered up to be canceled, and that the plaintiff's name should be restored to the records of Greenwood cemetery as the owner of the lot.

The loan of money made by Hickey to the plaintiff, it is urged on behalf of the plaintiff, was usurious and void, but the relief granted is not put upon that ground; and if Hickey or his assigns conclude that they have any legal claim for the recovery of the money loaned, they are at liberty to institute and prosecute an action for its recovery, to which the plaintiff, notwithstanding this determination, may interpose any defense he may have.

COURT OF APPEALS.

MARCUS T. HUN, as receiver of the Central Park Savings Bank, agt. JOHN G. CARY *et al.*

Savings bank—Liability of trustees for damages caused by their misconduct—Measure of fidelity, care and diligence, which such trustees owe to the bank and its depositors—Action against such trustees is an action at law—In such action one or all may be sued—Claim for unliquidated damages occasioned by tort not provable in bankruptcy.

The relation existing between the corporation and its trustees is mainly that of principal and agent; and the relation between the trustees and depositors is similar to that of trustee and *cestui que trust*.

The trustees are bound to observe the limits placed upon their powers in the charter, and if they transcend such limits and cause damage they incur liability. If they act fraudulently or do a willful wrong, they may be held for all the damage they may cause the bank or its depositors. But if they act in good faith within the limits of powers conferred, using proper prudence and diligence, they are not responsible for mere mistakes or errors of judgment.

When one deposits money in a savings bank, or takes stock in a corporation, thus divesting himself of the immediate control of his property, he expects, and has the right to expect, that the trustees or directors

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who are chosen to take his place in the management and control of his property will exercise ordinary care and prudence in the trust committed to them—the same degree of care and prudence that men prompted by self-interest generally exercise in their own affairs. When one voluntarily takes the position of trustee or director of a corporation, good faith, exact justice and public policy unite in requiring of him such degree of care and prudence, and it is a gross breach of duty, *crassa negligentia*, not to bestow them.

A trustee is bound not only to exercise proper care and diligence, but ordinary skill and judgment. As he is bound to exercise ordinary skill and judgment, he cannot set up that he did not possess them. When damage is caused by his want of judgment, he cannot excuse himself by alleging his gross ignorance. One who voluntarily takes the position of director or trustee and invites confidence in that relation, undertakes with those whom he represents, or for whom he acts, that he possesses at least ordinary knowledge and skill, and that he will bring them to bear in the discharge of his duties. Such is the rule applicable to public officers, to professional men and to mechanics, and such is the rule which must be applicable to every person who undertakes to act for another in a situation or employment requiring skill and knowledge; and it matters not that the service is to be rendered gratuitously.

The facts of this case examined; and, *held*, that the evidence justified a finding by the jury that this was not a case of mere error or mistake of judgment on the part of the trustees, but that it was a case of improvidence, of reckless, unreasonable extravagance, in which the trustees failed in that measure of reasonable prudence, care and skill which the law requires.

The receiver represents the bank, and may maintain any action the bank could have maintained. The trustees may be treated as agents of the bank, and for any misfeasance or nonfeasance causing damage to the bank they are responsible to it, upon the same principle that any agent is for like cause responsible to his principal. An action of this character is properly tried as an action at law.

In actions *ex delictu* the plaintiff may sue one or all the wrongdoers; and the objection that others should have been joined as defendants cannot prevail.

Where two of the trustees, who were made defendants in this action, filed petitions for their discharge in bankruptcy after the commencement of this action and were discharged before judgment:

Held, that the discharge furnished no defense; the claim was purely for unliquidated damages occasioned by a tort. Such a claim is not provable in bankruptcy and, therefore, was not discharged (*Affirming S. C., ante, 426*).

Decided September, 1880.

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E. Ellery Anderson, for defendants and appellants.

A. Wakeman, for defendant Smith, as respondent.

F. C. Barlow, for plaintiff, as respondent and appellant.

EARL, *J.*—This action was brought by the receiver of the Central Park Savings Bank of the city of New York against the defendants, who were trustees of the bank, to recover damages which, it is alleged, they caused the bank by their misconduct as such trustees.

The first question to be considered is the measure of fidelity, care and diligence which such trustees owe to such a bank and its depositors. The relation existing between the corporation and its trustees is mainly that of principal and agent; and the relation between the trustees and the depositors is similar to that of trustee and *cestui que trust*. The trustees are bound to observe the limits placed upon their powers in the charter, and if they transcend such limits and cause damage, they incur liability. If they act fraudulently or do a willful wrong, it is not doubted that they may be held for all the damage they cause to the bank or its depositors. But if they act in good faith within the limits of powers conferred, using proper prudence and diligence, they are not responsible for mere mistakes or errors of judgment. That the trustees of such corporations are bound to use some diligence in the discharge of their duties cannot be disputed. All the authorities hold so. What degree of care and diligence are they bound to exercise? Not the highest degree; not such as a very vigilant or extremely careful person would exercise. If such were required it would be difficult to find trustees who would incur the responsibility of such trust positions. It would not be proper to answer the question by saying the lowest degree. Few persons would be willing to deposit money in savings banks, or to take stock in corporations, with the understanding that the trustees or directors were bound only to exercise

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slight care, such as inattentive persons would give to their own business, in the management of the large and important interests committed to their hands. When one deposits money in a savings bank, or takes stock in a corporation, thus divesting himself of the immediate control of his property, he expects, and has the right to expect, that the trustees or directors who are chosen to take his place in the management and control of his property will exercise ordinary care and prudence in the trusts committed to them — the same degree of care and prudence that men prompted by self-interest generally exercise in their own affairs. When one voluntarily takes the position of trustee or director of a corporation, good faith, exact justice and public policy unite in requiring of him such degree of care and prudence, and it is a gross breach of duty, *crassa negligentia*, not to bestow them.

It is impossible to give the measure of culpable negligence for all cases, as the degree of care required depends upon the subjects to which it is to be applied (*First Nat. Bank agt. Ocean Nat. Bank*, 60 N. Y., 278). What would be slight neglect in the care of a quantity of iron might be gross neglect in the care of a jewel. What would be slight neglect in the care exercised in the affairs of a turnpike corporation, or even of a manufacturing corporation, might be gross neglect in the care exercised in the management of a savings bank intrusted with savings of a multitude of poor people, depending for its life upon credit and liable to be wrecked by the breath of suspicion. There is a classification of negligence to be found in the books — not always of practical value, and yet sometimes serviceable — into slight negligence, gross negligence, and that degree of negligence intermediate the two, attributed to the absence of ordinary care; and the claim on behalf of these trustees is that they can only be held responsible in this action in consequence of gross negligence, according to this classification. If gross negligence be taken according to its ordinary meaning, as something nearly approaching fraud or bad faith, I cannot yield to this claim; and if there

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are any authorities upholding the claim, I emphatically dissent from them.

It seems to me that it would be a monstrous proposition to hold that trustees intrusted with the management of the property, interests and business of other people, who divest themselves of the management and confide in them, are bound to give only slight care to the duties of their trust, and are liable only in case of gross inattention and negligence; and I have found no authority fully upholding such a proposition. It is true that authorities are found which hold that trustees are liable only for *crassa negligentia*, which literally means gross negligence; but that axiom has been defined to mean the absence of ordinary care and diligence adequate to the particular case.

In *Scott agt. De Peyster* (1 *Ed. Ch.*, 513, 543), a case much cited, the learned vice-chancellor said: "I think the question in all such cases should and must necessarily be, whether they (directors) have omitted that care which men of common prudence take of their own concerns? To require more would be adopting too rigid a rule and rendering them liable for slight neglect; while to require less would be relaxing too much the obligation which binds them to vigilance and attention in regard to the interests of those confided to their care, and expose them to liability for gross neglect only, which is very little short of fraud itself."

In *Spering's Appeal* (71 *Penn. St.*, 11), judge SHARSWOOD said: "They (directors) can only be regarded as mandataries, persons who have gratuitously undertaken to perform certain duties, and who are therefore bound to apply ordinary skill and diligence, but no more."

In *Hodges agt. New England Screw Co.* (1 *R. I.*, 312), JENCKES, J., said: "The sole question is whether the directors have or have not bestowed proper diligence. They are liable only for ordinary care—such care as prudent men take in their own affairs." And in the same case, AMES, J., said: "They should not, therefore, be liable for innocent mistakes,

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unintentional negligence, honest errors of judgment, but only for willful fraud or neglect, and want of ordinary knowledge and care." The same case came again under consideration in 3 *Rhode Island*, 9, and GREEN, Ch. J., said: "We think a board of directors, acting in good faith and with reasonable care and diligence, who nevertheless fall into a mistake, either as to law or fact, are not liable for the consequences of such mistake."

In the case of *The Liquidators of the Western Bank* agt. Douglas (11 *Session Laws* [3d series], 112 [Scotch]), it is said: "Whatever the duties (of directors) are, they must be discharged with fidelity and conscience, and with ordinary and reasonable care. It is not necessary that I should attempt to define where excusable remissness ends and gross negligence begins. That must depend to a large extent on the circumstances. It is enough to say that gross negligence in the performance of such a duty, the want of reasonable and ordinary fidelity and care will impose liability for loss thereby occasioned."

In *The Charitable Corporation* agt. Sutton (2 *Atkyns*, 405), lord chancellor HARDWICKE said that a person who accepted the office of director of a corporation "is obliged to execute it with fidelity and reasonable diligence," although he acts without compensation.

In *Litchfield* agt. White (3 *Sandf.*, 545), SANDFORD, J., said: "In general, a trustee is bound to manage and employ the trust property for the benefit of the *cestui que trust* with the care and diligence of a provident owner. Consequently he is liable for every loss sustained by reason of his negligence, want of caution or mistake, as well as positive misconduct."

In *Spering's Appeal* judge SHARSWOOD said that directors "are not liable for mistakes of judgment, even though they may be so gross as to appear to us absurd and ridiculous, provided they were honest, and provided they are fairly within the scope of the powers and discretion confided to the managing body."

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As I understand this language, I cannot assent to it as properly defining to any extent the nature of a director's responsibility. Like a mandatary, to whom he has been likened, he is bound not only to exercise proper care and diligence, but ordinary skill and judgment. As he is bound to exercise ordinary skill and judgment, he cannot set up that he did not possess them. When damage is caused by his want of judgment, he cannot excuse himself by alleging his gross ignorance. One who voluntarily takes the position of director and invites confidence in that relation, undertakes like a mandatary, with those whom he represents or for whom he acts, that he possesses at least ordinary knowledge and skill, and that he will bring them to bear in the discharge of his duties (*Story on Bailments, sec.*, 182). Such is the rule applicable to public officers, to professional men and to mechanics, and such is the rule which must be applicable to every person who undertakes to act for another in a situation or employment requiring skill and knowledge; and it matters not that the service is to be rendered gratuitously. These defendants voluntarily took the position of trustees of the bank. They invited depositors to confide to them their savings, and to intrust the safe-keeping and management of them to their skill and prudence. They undertook not only that they would discharge their duties with proper care, but that they would exercise the ordinary skill and judgment requisite for the discharge of their delicate trust.

Enough has now been said to show what measure of diligence, skill and prudence the law exacts from managers and directors of corporations, and we are now prepared to examine the facts of this case for the purpose of seeing if these trustees fell short of this measure in the matters alleged in the complaint.

This bank was incorporated by the act chapter 467 of the Laws of 1867, and it commenced business in the spring of that year in a hired building on the east side of Third avenue in the city of New York. It remained there for several years,

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and then removed to the west side of the avenue, between Forty-fifth and Forty-sixth streets, where it occupied hired rooms until near the time of its failure in the fall of 1875. During the whole time the deposits averaged only about \$70,000. In 1867 the income of the bank was \$942.12, and the expenses, including amounts paid for safe, fixtures, charter, current expenses and interest to depositors, were \$5,571.34. In 1868 the income was \$5,471.43, and the expenses, including interest to the depositors, \$5,719.43. In 1869 the income was \$3,918.27, and the expenses and interest paid \$5,346.05. In 1870 the income was \$5,784.09, and expenses and interest \$7,040.22. In 1871 the income was \$13,551.14, which included a bonus of \$4,000 or \$6,000 obtained upon the purchase of a mortgage of \$40,000, which mortgage was again sold in 1874 at a discount of \$2,000, and the expenses, including interest paid, were \$9,124.05. In 1872 the income was \$5,100.51, and the expenses, including interest paid, were \$7,212.49. Down to the first day of January, 1873, therefore, the total expenses, including interest paid, were \$5,046 more than the income. To this sum should be added \$2,000, deducted on the sale of the large mortgage in 1874, which was purchased at the large discount in 1871, as above-mentioned, and yet entered in the assets at its face. From this apparent deficiency should be deducted the value of the safe and furniture of the bank, from which the receiver subsequently realized \$500. At the same date the amount due to over 1,000 depositors was about \$70,000, and the assets of the bank consisted of about \$13,000 in cash and the balance mostly of mortgages upon real estate.

While the bank was in this condition, with a lease of the rooms then occupied by it expiring May 1, 1874, the project of purchasing a lot and erecting a banking-house thereon began to be talked of among the trustees. The only reason put on record in the minutes of the meetings held by the trustees for procuring a new banking-house was to better the financial condition of the bank. In February, 1873, at a

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meeting of the trustees, a committee was appointed "on a site for a new building," and in March the committee entered into contract for the purchase of a plot of land, consisting of four lots, on the corner of Forty-eighth street and Third avenue, for the sum of \$74,500, of which \$1,000 was to be paid down, \$9,000 on the first day of May, then next, and \$64,000 to be secured by a mortgage, payable on or before May 1, 1875, with interest from May 1, 1873, at seven per cent; and there was an agreement that payment of the principal sum secured by the mortgage might be extended to May 1, 1877, provided a building should, without unavoidable delay, be erected upon the corner lot worth not less than \$25,000. This contract was reported by the committee to the trustees at a meeting held April seventh. On the 1st day of May, 1873, the real estate was conveyed and the cash payment was made, and four separate mortgages were executed to secure the balance, one upon each lot. The mortgage upon the lot, upon which the bank building was afterwards erected, was for \$30,500. At the same time the bank became obligated to build upon that lot a building covering its whole front, twenty-five feet, and sixty feet deep, and not less than five stories high, and have the same inclosed by the first day of November, then next. Upon that lot the bank proceeded, in the spring of 1875, to erect a building covering the whole front, and seventy-six feet deep and five stories high, at an expense of about \$27,000, and the building was nearly completed when the receiver of the bank was appointed, in November of that year. The three lots not needed for the building were disposed of, as we may assume, without any loss, leaving the corner lot used for the building to cost the bank \$29,250; and we may assume that that was then the fair value of the lot. This case may then be treated as if these trustees had purchased the corner lot at \$29,250, and bound themselves to erect thereon a building costing \$27,000. When the receiver was appointed that lot and building, and other assets which produced less than \$1,000, constituted the whole

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property of the bank; and subsequently the lot and building were swept away by a mortgage foreclosure, and this action was brought to recover the damages caused to the bank by the alleged improper investment of its funds, as above stated, in the lot upon which the building was erected. At the time of the purchase of the lot the bank was substantially insolvent. If it had gone into liquidation its assets would have fallen several thousand dollars short of discharging its liabilities; and this state of things was known to the trustees. It had been in existence about six years, doing a losing business. The amount of its deposits, which its managers had not been able to increase, shows that the enterprise was an abortion from the beginning, either because it lacked public confidence or was not needed in the place where it was located. It had changed its location once without any benefit. It had on hand but about \$13,000 in cash, of which \$10,000 were taken to make the first payments. The balance of its assets was mostly in mortgages not readily convertible. One was a mortgage for \$40,000 which had been purchased at a large discount, and we may infer that it was not very saleable, as the trustees resolved to sell it as early as May, 1873, and in August, 1873, authorized it to be sold at a discount of not more than \$2,500, and yet it was not sold until 1874. In this condition of things the trustees made the purchase complained of, under an obligation to place on the lot an expensive banking-house. Whether, under the circumstances, the purchase was such as the trustee, in the exercise of ordinary prudence, skill and care could make, or whether the act of purchase was reckless, rash, extravagant, showing a want of ordinary prudence, skill and care, were questions for the jury. It is not disputed that under the charter of this bank, as amended in 1868 (*chapter 294*), it had the power to purchase a lot for a banking-house "requisite for the transaction of its business." That was a power, like every other possessed by the bank, to be exercised with prudence and care. Situated as this moribund institution was, was it a prudent and reasonable thing

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to do to invest nearly half of all the trust funds in this expensive lot, with an obligation to take most of the balance to erect thereon an extravagant building? The trustees were urged on by no real necessity. They had hired rooms where they could have remained; or, if these rooms were not adequate for their small business, we may assume that others could have been hired. They put forward the claim, upon the trial, that the rooms they then occupied were not safe. That may have been a good reason for making them more secure, or for getting other rooms, but not for the extravagance in which they indulged. It is inferable, however, that the principal motive which influenced the trustees to make the change of location was to improve the financial condition of the bank by increasing its deposits. Their project was to buy this corner lot and erect thereon an imposing edifice to inspire confidence, attract attention, and thus draw deposits.

It was intended as a sort of advertisement of the bank; a very expensive one. Indeed, savings banks are not organized as business enterprises. They have no stockholders, and are not to engage in speculation or money-making in a business sense. They are simply to take the deposits, usually small, which are offered, aggregate them and keep and invest them safely, paying such interest to the depositors as is thus made, after deducting expenses, and paying the principal upon demand. It is not legitimate for the trustees of such a bank to seek deposits at the expense of present depositors. It is their business to take deposits when offered. It is not proper for these trustees, or at least the jury may have found that it was not, to take the money then on deposit and invest it in a banking-house merely for the purpose of drawing other deposits. In making this investment the interests of the depositors, whose money was taken, can scarcely be said to have been consulted.

It matters not that the trustees purchased this lot for no more than a fair value, and that the loss was occasioned by the subsequent general decline in the value of real estate.

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They had no right to expose their bank to the hazards of such a decline. If the purchase was an improper one when made, it matters not that the loss came from the unavoidable fall in the value of the real estate purchased. The jury may have found that it was grossly careless for the trustees to lock up the funds in their charge in such an investment, where they could not be reached in any emergency which was likely to arise in the affairs of the crippled bank. We conclude, therefore, that the evidence justified a finding by the jury that this was not a case of mere error or mistake of judgment on the part of the trustees, but that it was a case of improvidence, of reckless, unreasonable extravagance, in which the trustees failed in that measure of reasonable prudence, care and skill which the law requires.

This case was moved for trial at a circuit court, and before the jury was impaneled the defendants claimed that the case was improperly in the circuit, and that it should be tried at special term, and the court ordered that the trial proceed; and at the close of the evidence the defendants moved that the complaint be dismissed, on the ground that the action was not a proper one to be tried before a jury and should be tried before the equity branch of the court. The motion was denied, and these rulings are now alleged for error. The receiver in this case represents the bank and may maintain any action the bank could have maintained. The trustees may be treated as agents of the bank (*In re German Mining Co.*, 27 *Eng. Law & Eq.*, 158; *Belknap agt. Davis*, 19 *Me.*, 455; *Bedford R. R. Co. agt. Bowser*, 48 *Penn. St.*, 29; *Butts agt. Woods*, 38 *Barb.*, 181; *Austin agt. Daniels*, 4 *Den.*, 299; *O. & M. R. R. Co. agt. McPherson*, 35 *Mo.*, 13), and for any misfeasance or nonfeasance causing damage to the bank they were responsible to it, upon the same principle that any agent is for like cause responsible to his principal. It has never been doubted that a principal may sue his agent in an action at law for any damages caused by culpable misfeasance or nonfeasance in the business of the agency. The only

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relief claimed in this complaint was a money judgment, and we think it was properly tried as an action at law. No equitable rights were to be adjusted, and there was no occasion to appeal to an equitable forum.

Treating this, therefore, as an action at law, it follows also that the objection taken that the other trustees should have been joined as defendants cannot prevail. In actions *ex delictu* the plaintiff may sue one, some or all of the wrongdoers (*Liquidators of the Western Bank* agt. *Douglas*, 22 *Session Cases* [2d series], 475 [Scotch]; *Barbour on Parties*, 203).

The defendants Hoffman and Gearty filed petitions for their discharge in bankruptcy after the commencement of this action, and were discharged before judgment, and they alleged such discharge as a defense to the action. The trial judge and general term held that the discharge furnished no defense, and we are of the same opinion. This claim was purely for unliquidated damages occasioned by a tort. Such a claim is not provable in bankruptcy, and therefore was not discharged (*U. S. Rev. Stat.* [2d ed.], secs. 5115, 5119, 5067 to 5071; *Zimmon* agt. *Ritterman*, 2 *Abb.* [N. S.], 261; *Kellogg* agt. *Schuyler*, 2 *Den.*, 73; *Crouch* agt. *Gridley*, 6 *Hill*, 250; *In re Wiggers*, 2 *Biss.*, 71; *In re Clough*, 2 *Ben.*, 508; *In re Lidle*, 2 *Bank. Reg.*, 77).

I conclude, therefore, that the judgment appealed from should be affirmed.

The appeal by the plaintiff from the order of the general term granting a new trial as to defendant Smith, must, for reasons stated on the argument, be dismissed, with costs.

All concur.

Netzel agt. Mulford.

SUPREME COURT.

NETZEL agt. MULFORD.

Proceedings supplementary to execution — Warrant of arrest instead of order to examine judgment debtor — Sufficiency of affidavit to entitle a party to the warrant — Code of Civil Procedure, section 2437.

Under section 2437 of the Code of Civil Procedure, it is necessary for the creditor, before he is entitled to a warrant of arrest against the judgment debtor, to establish, to the satisfaction of the judge to whom the application for the issuing of a warrant is presented, by affidavit, that there is danger that the judgment debtor will leave the State or conceal himself, and there is reason to believe that he has property which he unjustly refuses to apply to the payment of the judgment.

Where the allegations in the affidavit, on which the warrant is asked are stated to be upon belief, and the fact of the defendant's having property is a mere matter of inference on the part of the plaintiff, based upon the fact that the defendant is a man of extravagant habits, living in the best of hotels, &c. :

Held, that such an affidavit is insufficient.

Special Term, September, 1880.

LAWRENCE, J. — Section 2437 of the Code of Civil Procedure is substantially the same as the fourth subdivision of section 292 of the old Code of Procedure. In applications made under section 292 of the old Code, it was invariably held that the statute required that there should be proof of the facts authorizing the issuing of the warrant, and that while such proof need not necessarily be in the form of an affidavit, it must be of such a character as to furnish evidence which, in the judgment of the officer, amounted to proof of the charge (*See 4 Waite's Pr., pp. 443 and 444*). So, too, in proceedings under the non-imprisonment act of 1831, it was invariably held that an affidavit stating the particulars authorizing the issuing of the warrant should not be upon information and belief; that the facts must be positively, and

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not inferentially stated (*Broadhead* agt. *McConnell*, 3 *Barb.*, 175; *Vredenberg* agt. *Hendricks*, 17 *Barb.*, 179, and cases cited). Under section 2437 of the present Code, it is necessary for the creditor, before he is entitled to a warrant of arrest against the judgment debtor, to establish, to the satisfaction of the judge to whom the application for the issuing of a warrant is presented, by affidavit, that there is danger that the judgment debtor will leave the State or conceal himself, and there is reason to believe that he has property which he unjustly refuses to apply to the payment of the judgment. I see no reason for holding that there should be any different rule of construction applied to this section from that which prevailed in reference to section 292 of the old Code, and to the non-imprisonment act of 1831. Tested by these principles of construction, it seems to me that this proceeding should be dismissed, and the warrant heretofore issued should be vacated. The allegations in the affidavit, on which the warrant was issued, are stated to be upon belief, and the fact of the defendant's having property is a mere matter of inference on the part of the plaintiff, based upon the fact that the defendant is a man of extravagant habits, living in the best of hotels, &c. I do not think such an affidavit sufficient. As was said by BRONSON, J., in the case of *The People* agt. *The Recorder of Albany* (6 *Hill*, 429): "In such cases, where the creditor may be his own witness for the purpose of procuring a warrant, and may choose his own time for arresting the debtor, it is not too much to require that he should in the first instance make out a plain case" (See, also, *Smith* agt. *Luce*, 14 *Wend.*, 227; *Matter of Bliss*, 7 *Ill.*, 187; *Stewart* agt. *Biddlecum*, 2 *Com.*, 103). The prisoner is, therefore, discharged.

Horton agt. La Due.

N. Y. MARINE COURT.

HORTON agt. LA DUE.

Application to the court for judgment by default — when necessary — Code of Civil Procedure, sections 420, 549, 1214.

Judgment by default in an action for conversion can be entered only on application to the court.

Special Term, September, 1880.

McADAM, J. — The action is in trover for the conversion of certain jewelry of the alleged value of \$516. The complaint, which is verified, was served with the summons, and the clerk entered judgment as by default, under section 420 of the Code of Civil Procedure. That section, properly construed, applies only to cases of express and implied contracts. The words "or the value of property delivered" used in said section, have reference to property delivered under some agreement, express or implied, whereby the person to whom the delivery is made has undertaken to pay the stipulated or reasonable value thereof. It was not intended to embrace cases where property has been delivered to a person, who tortiously converts the same to his own use, and who is sued for the conversion. The case falls under section 1214 (*supra*), and the plaintiff should have applied to the court for judgment, in which case the damages which were unliquidated would have been legally assessed. The plaintiff, after entering his judgment, issued an execution against the person of the defendant, under which he is now confined in the county jail. As no order of arrest was issued in the action the plaintiff can justify the imprisonment only on the theory that the cause of action furnished the right to arrest. This brings us to the consideration of section 549 (*supra*), in which the cases wherein such arrest is allowable are enumerated. Conversion

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and fraud are therein referred to, but an arrest "for the value of property delivered" is nowhere discovered. It must be apparent, therefore, that the plaintiff has mistaken the practice, and that the judgment and the proceedings founded upon it must be set aside. This conclusion rendered unnecessary the consideration of the other objections urged.

Ordered accordingly.

SUPREME COURT.

JAMES H. BYRON agt. THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, EDWARD FREEL and JOHN McNAMEE.

Right to personal judgment under chapter 815, Laws of 1878.

In an action brought to foreclose a lien, filed against a fund in the possession of the mayor, etc., of New York, on account of a contract made by them for public work in said city, the court has power under the act of 1878 (*Laws of 1878, chapter 815*), to render a *personal judgment* against the original debtor for the amount due from him in excess of the amount for which a lien has been established.

Where the lien is established to a certain amount, in such a case a *personal judgment* can be rendered in favor of the plaintiff against the contractor for the full amount due from him.

Special Term, February, 1880.

THIS is an action brought to foreclose a lien filed against a fund in the possession of the defendant, The Mayor, Aldermen and Commonalty of the City of New York, due and to grow due on account of a contract made by the said defendant for the construction of an arch in Forty-second street, New York.

The fund now amounts to \$1,300. The contract is in course of construction and other sums may become due. The lien is filed for materials furnished by the plaintiff for use on

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this contract amounting in the aggregate to \$1,114.29. It is admitted that the city contract was made in the name of Freel alone, but that the parties interested were the firm of Freel and McNamee. It is not disputed that the plaintiff's contract was made with both defendants. No question of pleading was raised on either side. The defendant, The Mayor, Aldermen and Commonalty of the City of New York, admits the possession of \$1,300 and offers no evidence. The lien was filed and the proceeding brought under Laws of 1878, chapter 315, entitled, "An act to secure the payment of laborers, traders and persons furnishing materials toward the performance of any public work in the cities of the state of New York."

L. L. Kellogg, for plaintiff, argued: I. No question can be raised as to the validity of the lien. It contains all the requisites of the statutes. It states correctly that the contract of the plaintiff was made with Freel and McNamee. The fact that it states that the city contract was with both Freel and McNamee is immaterial. The end of section 2 provides, "but no variance as to the name of the contractor shall affect the validity of the said claim or lien." II. All the materials were bought for use in this work. All the materials, however, have not yet been used in the work. As to the material used in the work the plaintiff is entitled to a judgment against the city, and to a personal judgment against the defendants Freel and McNamee. As to the materials not yet used the plaintiff is entitled solely to a personal judgment against the defendants Freel and McNamee. (a.) Inasmuch as this court acquired jurisdiction in this action, by reason of the validity of the lien as to the portion of the materials actually used in the work, it will retain jurisdiction for the purpose of rendering a personal judgment for the balance up to the amount claimed in the lien. This is well settled law (*Guernsey's Lien Law*, page 127, section 127; *McGravo agt. Godfrey*, 14 Abb. [N. S.], 402; *Hubbell agt.*

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Schuyler, 14 *Abb.* [*N. S.*], 310; *Rathbun* agt. *Warren*, 10 *Johns.*, 596; *King* agt. *Baldwin*, 17 *Johns.*, 384). (b.) The case cited by defendant's counsel, in manuscript opinion, was one in which the lien was declared invalid and of no force and effect, and the court, having acquired no jurisdiction, declined to award a personal judgment. It does not refer to, nor disturb, the principles established in above cited cases. (c.) A personal judgment is provided for in this act. Section 6 provides: "Any claimant who has filed the notice mentioned in second section of this act may enforce his claim against the said fund therein designated, and against the person or persons liable for the debt by a civil action." Section 7 refers to "parties against whom no personal claim is made." Section 8: "The court in which the action is brought shall determine the amount due from the debtor to the contractor," and "additionally shall render judgment directing the city to pay over," &c. Section 12 merely provides for bringing a personal action, when the lien is wholly invalid, or the party elects to maintain a personal action alone. The whole act as to its provisions in this regard does not differ in any material respect from the mechanic's lien act for New York county, passed in 1875. I have never heard it questioned that under this act personal judgment could be given. This position seems free from any doubt.

N. H. Clements, for defendants *Freel* and *McNamee*.

LAWRENCE, *J.* — In this case I am of opinion that the evidence establishes that the plaintiff furnished materials, amounting in value to the sum of \$465.29, which were actually used in and about the work referred to in the complaint. In arriving at this amount I have allowed thirty-six dollars as the value of the blue stone used in the performance of the work. From the aforesaid sum of \$465.29 there should be deducted the sum of ninety-three dollars, the amount paid by the defendants *Freel* and *McNamee* to the plaintiff, leaving

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an unpaid balance of \$372.29. For this amount the plaintiff has a lien which he can enforce against the fund in the hands of the city, under the provisions of chapter 315 of the Laws of 1878. I am also of the opinion that the evidence establishes that the defendants Freel and McNamee were indebted to the plaintiff, at the time of the commencement of this action, in the sum of \$832.29, for which amount the plaintiff is entitled to a personal judgment against them under the sixth section of the act aforesaid.

The evidence as to the sale and delivery of the blue stone is conflicting, and I do not feel warranted in holding that the plaintiff has established such sale or delivery to any greater extent than as to the small portion of the stone which was actually used in the work, and which was, as has been before stated, amounted to the sum of thirty-six dollars. The case of *Burroughs agt. Thompson*, which is cited by the learned counsel for the defendants, does not appear to me to be an authority against the power of the court, under the act of 1878, to render a personal judgment against the original debtor for the amount due from him, in excess of the amount for which a lien has been established.

The sixth section of the act seems to contemplate a complete settlement of the controversy between the materialman and his debtor in one action. The case above referred to in the court of appeals proceeded from the theory that as the materialman had failed to show that there was anything due from the owner of the land to the first contractor, no lien whatever was established, and, therefore, the action could not be maintained for the purpose of rendering a personal judgment against the contractor. Here the lien is established to a certain amount, and it would appear that in such a case a personal judgment can be rendered in favor of the plaintiff against the contractor for the full amount due from him (*Hubbell agt. Schreyer*, 14 *Abbott* [N. S.], 286).

Judgment accordingly. Findings may be settled on two days' notice.

Adee agt. Howe.

SUPREME COURT.

GEORGE ADEE agt. MARIA HOWE.

Pension — What attorney may charge for prosecuting a claim for a pension.

Although an attorney is prohibited by the laws of the United States from charging or taking more than ten dollars for prosecuting a claim for a pension, such prohibition does not cover services rendered for the person claiming the pension after the certificate for the same was issued.

Delaware Circuit, March, 1880.

THIS action was brought to recover for services and disbursements in procuring a pension for defendant. It was first tried before a referee and plaintiff's complaint dismissed, with costs. Plaintiff appealed to the general term where a new trial was ordered (*Adee agt. Howe*, 15 *Hun*, 20). It is the same case upon which plaintiff was prosecuted in the United States court, referred to in the above decision. It appeared upon the trial that plaintiff had been prosecuted upon a complaint made by S. H. H. Parsons, United States Pension Agent of Albany, and an examination had before W. Frothingham, United States Commissioner, and that Richard Crowley, United States District-Attorney, then took charge of the case. Plaintiff claimed and asserted that the proceedings being had in the United States court were unwarranted. While those proceedings were pending in the United States court the plaintiff repaid to the defendant, by and with the consent of her agent, S. H. H. Parsons, \$110, being all the money he had charged or received of defendant, upon condition and with the understanding that she would resettle and pay him what he was legally entitled to charge and receive by law.

It further appeared upon the trial that the defendant's husband, Stafford Howe, enlisted in the army in the fall of 1861

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and served three years, and then re-enlisted and was killed in May, 1864, in the Wilderness, Virginia; that defendant immediately employed H. F. Davidson, Esq., of Delhi, to get her a pension, and after about three years he failed therein, and she then employed Mr. Young, of Otsego county, and after about three years he also failed to procure a pension for her. The great trouble in her case was to make proof of Howe's death. Defendant then, under the advice of her brother-in-law, applied to plaintiff, in February, 1870, to get it for her. Plaintiff at first declined, stating that he was not a United States pension or claim agent, had taken no license nor oath of allegiance and could not prosecute a claim against the United States government. But she insisted and he finally consented to assist her as a lawyer, as any other person could do, she to prosecute her claim in her own name and pay him, or any person employed by him, out of money other than United States pension money. Plaintiff went to work, made divers journeys, wrote many letters and paid expenses and disbursements, before pension was granted, of forty-two dollars and fifty-five cents. J. C. Brown, at defendant's request, made several journeys and incurred an expense of twenty-five dollars, and then not succeeding therein plaintiff employed H. E. Stoutenburg, with defendant's approval, on condition that if he would procure the remaining evidence he was to have fifty dollars, but if he did not get it then he was to have no pay. He refused to trust defendant and plaintiff became personally liable for it. After much expense he procured the proof and plaintiff sent it to Washington, and February 27, 1873, a certificate for a pension was issued to defendant. But this certificate was misdirected, and plaintiff was employed to look it up and incurred further expenses of seven dollars and ninety-three cents; and Richard McAlister, of Washington, was also employed to look after it and charged therefor ten dollars. The certificate was received and delivered to defendant May 14, 1874, at which time all the claims and expenses herein were talked over between plaintiff and defendant, and

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defendant paid plaintiff out of money, other than United States pension money, \$110, out of which he was to pay McAlister ten dollars, Brown twenty-five dollars and Stoutenburg fifty dollars, if defendant did not settle with him for a less sum before June 1, 1874. If she did plaintiff was to have what was left for his services and expenses. If she did not pay Stoutenburg then plaintiff was to pay him and be the actual loser. .

THE COURT — MURRAY, J., charged the jury as follows: Gentlemen, I have caused the plaintiff to make a statement of the items which he gave in his evidence, which will be handed you by the consent of counsel. But I will call your attention to each of them particularly so that you may understand the rules that govern each and every one of them.

The first item is ten dollars for his services as attorney previous to the time that this pension certificate was issued. You see he was employed in 1870 and performed services until the 1st of March, 1873, and also until May, 1874, and he divides that time and charges for all services that were rendered previous to the 27th day of February, 1873, when the pension certificate was issued, simply ten dollars. That is all that he could charge under the laws of the United States. He could not charge any more than that. The law prohibits him from taking more than that for prosecuting a claim for a pension.

Then the next item is a claim of \$150 for services rendered from and after the 27th day of February, 1873, up to May 14, 1874. You see that was after the pension certificate was issued and after the prohibition in the statute of the United States as against any person taking more than ten dollars for services in obtaining a pension, and he claims that the services performed after the certificate was issued do not come within the prohibition of the statute — and I think that is so; that the prohibition would not cover services rendered for her after this certificate was issued; and then it is for you to say what those services were worth. He has made a charge of

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\$150, but you, as men of judgment and good sense and experience, are to say what they were reasonably worth. He would be entitled to recover what his services, done for her during that year and three months, were worth. He has given you an account of the services substantially that he performed; that he went to Franklin to see her on two different occasions; that he wrote to Mr. McAlister, at Washington, and received back this blank power of attorney, which he filled up and caused it to be sent to Franklin and returned to him by mail, and then he sent it to McAlister. And he paid various items of postage and kept watch of the case and looked after it, but did nothing else in particular. You are to say what that is reasonably worth. What she should reasonably pay him for those services rendered during that year and three months from and after the 27th of February, 1873, up to May 14, 1874, at the time they met and had that settlement in Franklin. You are to look at this. You have heard the evidence, and you have sufficient judgment and experience and good sense to say what would be fair as between him and her in regard to the services then performed. Of course you are aware that attorneys charge more than for ordinary service. Attorneys that have charge of business, they always charge, and they have the right to charge, more than ordinary clerical hire, and the mere price that he would have to pay for drawing the power of attorney would not be a compensation for him in keeping charge of and looking after the case. And you are to say what would be reasonable — that is all. He is simply entitled to reasonable compensation. The fact that he has made a charge and thinks those services were worth \$150 is not controlling upon you; you are the ones to judge of this and to say, under all the circumstances, what she should pay to him for that year and three months' services done in that manner and in that way. Then you have the fact that he paid to Mr. Stoutenburg fifty dollars. If his evidence is true that she was to settle with Mr. Stoutenburg before the first day of June, when he expected to be here to

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attend court, and that she failed to do so within that time, and he paid over to him the money without any knowledge that she had made an arrangement with Mr. Stoutenburg for a less sum; if that is the true version of the case, why then it seems to me that under the evidence in this case he would be entitled to recover the sum, because Mr. Stoutenburg says his services and expenses were worth that, and that he made up an itemized account and it amounted to fifty-two dollars, and that the agreement between him and Mr. Adee was that Mr. Adee was to be personally liable, and he was to take special pains to look up the necessary affidavits. This, you see, turns upon this fact. She testifies that there was no time fixed within which she was to pay it. And it is claimed on the part of the defendant that Mr. Adee on his return from Albany, without waiting and giving her ample opportunity to settle with Mr. Stoutenburg, went and voluntarily paid it, so as to have the benefit of it before the United States court. That is the theory on the part of the defendant. But Mr. Adee says he had to attend court here at that time and that it was understood and agreed between him and Mrs. Howe that she was to pay it before that time, and she says that it was not so. If her statement is true and Mr. Adee, unreasonable and with undue and unseemly haste, paid this fifty dollars and deprived her of the opportunity of settling it for a less sum, which she would have been enabled to do, why, then, it is for you to say whether he should recover it under those circumstances. It seems to me that if the agreement was, as she testifies, that there was no limit to her time, that she should have been given time and some notification given to her in regard to it before this fifty dollars was paid over. But it is a question for you. You are to look at it and say what you believe to be the truth in regard to it.

And then he paid J. C. Brown twenty-five dollars. There is no dispute about that. He says he agreed, in the settlement with her at Franklin, May 14, 1874, to pay it. She says there was nothing said about it. If he did not agree

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to pay it and went voluntarily and paid it without any knowledge or request on her part, then he cannot recover it. But if he agreed with her that he would pay it, and did pay it, in pursuance of such an agreement, he would be entitled to recover it of her. You are to say which is right in regard to that. Did he pay this in pursuance of an agreement and understanding with her that he should? Or did he voluntarily and of his own accord and without any request on her part go and pay it? If the latter was the case he cannot recover it. If the former was the case he can recover it. Then he paid McAlister ten dollars, and there seems to be no dispute about that. It would seem that he should recover that from her. He paid it by her direction and by her request, and Mr. McAlister was suggested as an agent by Dr. Foote, and in her presence, so there could be no dispute about the McAlister ten dollars. In all of these transactions Mr. Adee makes various journeys and is put to expense in regard to this matter, and he pays out his money for such expenses, before the pension was granted, forty-two dollars and fifty-three cents, and after it was granted seven dollars and ninety-three cents, making the amount fifty dollars and forty-six cents. That is the actual expense he paid out while he was in the performance of services for her and at her request and direction; that he would be entitled to recover if such money was paid out by him in the performance of her business, with her understanding and request. These are the six items which have been stated by the plaintiff for which he claims to recover, and you are to look over them carefully and say what is right in regard to them. And then you have the right, and it would be your duty, to allow him interest from and after the time they met in Franklin, which was May 14, 1874. You should compute interest on whatever amount you shall find due to him from the 14th of May, 1874, up to this time, and add that to the amount that you shall find to be due him, and that should be your verdict.

It has been mentioned that this suit has been tried before; but with that you have nothing to do whatever. You take

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the evidence here; you consider and deliberate upon the case precisely as if it never had been in court before, and look upon the evidence and exercise your own judgment in regard to every question that arises in the case. The credit of a witness is always in the hands of the jury. You are the ones to say what evidence you believe to be truthful and what evidence you believe to be untruthful; and you are to give weight to the evidence that you believe to be true, and discard the evidence that you believe to be false.

Under these instructions you will take this case and render such a verdict as you believe the evidence warrants.

The jury rendered a verdict for plaintiff of "two hundred seventy-five dollars and forty-two cents." No appeal.

SUPREME COURT.

THE PEOPLE *ex rel.* MARY ANN JACKSON agt. DAVID
McADAM, justice, &c.

Summary proceedings commenced before one justice — How continued before another — Code of Civil Procedure, sections 26, 52 and 58.

Summary proceedings under the statutes to recover the possession of lands, &c., commenced before one marine court justice may be continued before another by consent of the parties.

Special Term, October 5, 1880.

S. C. WELCH, as landlord, commenced summary proceedings under the statute, before chief justice SHEA of the New York marine court, to dispossess Mary Ann Jackson, as an overholding tenant, from the premises 2128 Third avenue. The proceedings, after several adjournments, were, by the written consent of the parties, continued before Mr. justice McADAM, who tried the proceeding and finally filed an opinion ordering judgment for the landlord.

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Mrs. Jackson thereupon obtained from the supreme court an alternative writ of prohibition enjoining judge McADAM from issuing a warrant or proceeding further in the matter, upon the ground that he had no power to continue the proceeding.

The hearing was had upon the motion to make the writ absolute.

Geo. P. Avery and *O. J. Hockstader*, for relator, claimed that consent did not confer jurisdiction, and cited *Benjamin agt. Benjamin* (5 *N. Y.*, 383).

D. M. Helm, for S. C. Welch, landlord.

David McAdam, the justice, in person, cited sections 26, 52 and 53 of the Code of Civil Procedure (applicable to the marine court as a court of record), permitting any special proceeding instituted before one justice of the court to be continued before any other justice thereof, and also cited *McGregor agt. Comstock* (16 *Barb.*, at p. 427) and *Dresser agt. Van Pelt* (15 *How. Pr.*, 19), and contended that all questions as to jurisdiction was put at rest by the written consent of the parties; that having jurisdiction of the subject matter, consent gave him jurisdiction over the parties, citing *Cowen's Treatise* [*Kingsley's 5th ed.*], sec. 20; *McCormick agt. The Pennsylvania Central Railroad Company* (49 *N. Y.*, 303). He claimed that the case of *Benjamin agt. Benjamin* (5 *N. Y.*, 383) was inapplicable because the statute in force at that time provided that if the tenant filed a counter affidavit, the matters controverted "*must be tried by a jury*" (2 *R. S.* [2d ed.], p. 423, sec. 84). In other words, that the justice should not try the issue. The matters were controverted and the justice, in that case, instead of trying the issues by a jury as required by statute, tried them himself. The court, therefore, held that he had no powers and that as the statute did not give him jurisdiction, consent could not confer it. Whereas,

Teschner agt. Deveron.

under the present statute, justice McADAM was authorized to try this or any other summary proceeding without the aid of a jury, and that the distinction between the two cases was, therefore, marked and apparent. The conduct of the relator's counsel in signing a stipulation which they intended to be binding only in case the justice decided in favor of their client was condemned, as not only trifling with a confiding adversary but with the court itself.

LAWRENCE, J. — I am of opinion that this writ ought to be dismissed, and I refer to the points presented by the learned justice of the marine court with approval.

Writ dismissed.

N. Y. MARINE COURT.

SOLOMON TESCHNER agt. JOHN DEVERON.

Replevin—Chattels—how reclaimed by defendant—Code of Civil Procedure, sections 1704–1706.

Where a defendant desires to reclaim chattels replevied he must serve upon the sheriff written notice that he requires the return thereof; and he must file an affidavit that he is the owner of the property, or that he is lawfully entitled to the possession thereof.

These conditions are *mandatory*, and the failure of a defendant to comply with them renders his counter-bond nugatory.

Special Term, September, 1880.

McADAM, J. — A defendant who desires to reclaim chattels replevied must serve upon the sheriff written notice that he requires the return thereof, and must file an affidavit either that he is the owner of the property, or that he is lawfully entitled to the possession thereof, in the form prescribed by section 1704 of the Code of Civil Procedure. These conditions are mandatory, and the failure of the defendant to comply with them renders his counter-bond nugatory. The plaintiff is, therefore, entitled to possession of the chattel

Taylor agt. Charter Oak Life Insurance Company.

pendente lite (Section 1706). The defendant, in consequence of the omission to give the requisite preliminary notice and affidavit, must await the trial of the action before his right to the return can be established.

N. Y. COMMON PLEAS.

JOHN TAYLOR and ELIZA TAYLOR agt. THE CHARTER OAK
LIFE INSURANCE COMPANY.

Insurance — Rights of policyholder.

The holder of a lapsed policy cannot sustain action against a company. Mere suspicion of insolvency and abuse will not justify a policyholder in lapsing his policy.

There is no trust relation between the policyholder of the mutual company and the company.

An action in equity will not lie on such a theory.

It is questionable whether a suit to wind up a foreign company, or to interfere with its affairs, can be maintained in this State.

THIS was a suit heard on demurrer to complaint. The suit was against the defendant, a mutual life insurance company. The suit was brought to declare the defendant trustee of the premiums paid, and of the other assets, and declaring that the defendant is trustee for all persons holding policies in the corporation defendant; an account of all the doings of the defendant between the years 1865 and 1877; to obtain a declaration of the court that the "trusts be declared broken and terminated," and repayment to the plaintiffs of premiums paid and the earnings on the said policy. The suit was brought on behalf of plaintiffs, and all others similarly situated.

The policy lapsed in June, 1877. The plaintiffs sought to excuse this lapse by saying that, in the month of June, 1877, they were informed of wrongful acts mentioned in the latter part of the complaint, by the defendant, and that the plaintiffs thereupon refused to pay their premiums

Electro-Silicon Company agt. Levy.

The acts objected to were certain investments of the defendant. The defendant is a Connecticut corporation.

W. J. Butler, for plaintiffs.

Charles B. Alexander and *A. J. Vanderpoel*, for defendant.

BEACH, J. — I have serious doubt as to the jurisdiction of this court to entertain this action against the defendant, a foreign corporation.

The admitted fact that the policy had lapsed by the non-payment of premium before the commencement of this suit, disposes of the plaintiff's claimed right of action for the recovery of premiums paid.

There was no trust between the parties by virtue of the policy, and the relief demanded, based upon the existence of that relationship, cannot, therefore, be obtained.

Judgment for the defendant on demurrer, with costs.

SUPREME COURT.

THE ELECTRO-SILICON COMPANY agt. BENJAMIN LEVY.

Trade-mark — When an imitation of the packages, labels and manner of dressing goods of another will be restrained by injunction.

An imitation of the packages, labels and manner of dressing goods of another will be restrained by injunction where the party has combined these things in such a manner as to invade the plaintiff's rights, secured by their first adoption in combination, and in a way well calculated to deceive buyers of the article.

Special Term, June, 1880.

Chase & Bestow, for plaintiff.

Otto Horintz, for defendant.

Electro-Silicon Company agt. Levy.

VAN VORST, J. — The plaintiff can have no exclusive right to the use of the word "silicon," which is one in common use, and is reasonably, in so far as the substance of this powder is concerned, descriptive. Perhaps it is not technically accurate to call the "infusorial earth," used by these parties to produce the powder, and which is found in various parts of the globe in a natural state, "silicon." Silicon largely predominates, but the product itself is silicon plus oxygen. The plaintiff however, in its description of the article printed on its boxes, says it has been "ascertained by analysis to be pure silex, or silicon." If that representation be true I do not see why the defendant, if he makes a powder from the same deposit or substance, may not also call it "silicon." Of a word which plaintiff admits to be descriptive it can have no monopoly.

In the case of this same plaintiff against Trask, lately decided by me, the defendant clearly enough designed to simulate the peculiar name which the plaintiff had originally adopted to distinguish its article—"electro-silicon." Trask called his article "electric-silicon." The slight change was itself suggestive of a fraudulent intention. The evidence showed that Trask's design in adopting that name, and in the manner in which he put up his powder, was to get advantage of the trade which plaintiff had secured (*Electro-Silicon Co. agt. Trask, ante, page 189*).

The defendant in this case calls his article "Nevada silicon." But in other respects he has followed Trask's methods, which have been condemned.

In preparing his article for market defendant has carefully followed the plaintiff in the size and form of the boxes used and the material out of which they are made, and he has covered the top and sides with yellow paper, with printed matter arranged on the top within a circular border, one of a heavy and the other of a light black line, clearly in imitation of the plaintiff's manner of presenting his article. And as the plaintiff has imprinted on its label its corporate name, "Electro-Silicon Co.," the defendant has printed on his boxes,

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in the same relative position, the name "Nevada Silicon Co.," whereas, as the proof discloses, there was no such company.

The defendant had once been in the employment of the plaintiff, was entirely familiar with its business and trademarks, and had been in communication with its customers. It seems to me that his object in so imitating the plaintiff's packages, in his own preparation, is quite apparent. The plaintiff had, at much expense and considerable effort, put forth through many years, secured a large trade for what is proved to be a really useful article. I think it quite evident that the defendant, by such imitation, would take to himself some of the plaintiff's trade and profit. By honest and conscientious efforts there is no possible objection to his successful manufacture and sale of the article he produces, but he should not be allowed by any unfair artifice to impose upon others his article for the plaintiff's, and in this way deceive buyers and injure the plaintiff.

The testimony of many dealers in the article has been taken, and the weight of the evidence is that the defendant's article is so put up as readily to deceive the ordinary and unobservant purchaser.

A close examination, it is true, does disclose many differences in the printed matter, but the general appearance of the two packages is much alike. The coincidence is not accidental, and was evidently designed. The learned judge before whom the motion for an injunction was heard at chambers restrained the defendant, and I think he was correct in his conclusion. The evidence adduced on the hearing justifies a like result.

The defendant should be restrained by the judgment of this court, not because he is prohibited from using the word "silicon," or for the reason that he uses a round wooden box or yellow paper with border and printing thereon. To these separately the plaintiff is not entitled to exclusive use. But the defendant has combined this word and these things in such a manner as to invade the plaintiff's rights, secured by

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their first adoption in combination. The defendant has so closely imitated the plaintiff's combined use of these elements as to inflict injury upon him, and in a way well calculated to deceive buyers of the article.

The defendant's article should stand on its own merits and be introduced in a manner as not to conflict with the plaintiff's rights. The success of a new enterprise, which is often attended with difficulty, might be at once secured if its projectors could take to themselves and utilize the good reputation of others, symbolized in part by their marks and badges. But without consent that cannot be done (*Enoch Morgan's Sons Co. agt. Schanchofer*, 5 *Abbt. [N. C.]*, 265; *Brown agt. Mercer*, 37 *Superior Court Reports*, 265).

There should be judgment for the plaintiff based upon the principles above indicated.

N. Y. MARINE COURT.

ADELIA C. FITZPATRICK agt. JENKINS VAN SCHAICK *et al.*

Examination of adverse party before trial — Code of Civil Procedure, section 878.

An order for the examination of an adverse party before trial will not be granted where the applicant only seeks to find out what the opposite party will swear to, so as to enable him to prepare to meet and overcome it.

Special Term, September, 1880.

MOADAM, J. — The defendants justify the sale of the 200 shares of Delaware and Lackawanna stock (alleged by the plaintiff to have been converted) under an order given by one Maria L. Hubbard, whom the defendants claim was the plaintiff's agent. The plaintiff seeks to examine the defendants

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for the purpose of discovering whether Mrs. Hubbard was the plaintiff's or defendants' agent. The plaintiff, in the nature of things, ought to know as much about this as the defendants. If she was not the plaintiff's agent, the main defense fails. As the defendants have the affirmative of the defense, the plaintiff, under the rule laid down in *Chapin agt. Thompson* (16 *Hun*, 53), will have to wait until the trial before she can oblige the defendants to tell her what they will swear to concerning it.

Order vacated.

SUPREME COURT.

REBECCA BIRGE agt. GEORGE R. R. AINSWORTH *et al.*

Sale under foreclosure—Fees of sheriff or referee on—Code of Procedure, section 809.

Under the judiciary act the poundage of the referee on foreclosure and sale is limited to ten dollars, and is not increased by the act of 1876 amending section 809 of the Code of Procedure.

This amendment does not *give* the right to such fees or poundage, but is merely a *limitation* of the fees or poundage allowable, the right thereto being dependent upon other statutory provisions.

If the seventy-seventh section of the judiciary is repealed the referee is remitted to the three dollars per day under the general rule as to referees' fees.

Monroe Special Term, March, 1880.

HON. CHARLES C. DWIGHT, Justice.

THIS was an action for the foreclosure of a mortgage of real estate. A decree was duly made in the usual form for the foreclosure and sale by the sheriff of Steuben county, as referee. The whole amount of the mortgage debt was due, amounting to about \$5,000. The entire premises were sold

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by the referee for about \$4,000, leaving a deficiency of over \$1,000. No bond was given with the mortgage. The referee claimed that he was entitled to reserve as his fees for making said sale the sum of fifty dollars, besides disbursements, under section 309 of the Code of Procedure and the authority of *Walbridge agt. James* (16 *Hun*, p. 8).

This motion was made by plaintiff to tax the fees of the referee at ten dollars, and to compel him to pay the residue of the fifty dollars to the plaintiff.

McMaster & Parkhurst, for motion. The word "fees" in the statute does not embrace commissions or poundage. The word refers only to the statutory fee for making deed, reports, &c. (*Delevan agt. Payn*, 8 *Paige*, 460; *Innes agt. Purcell*, 2 *N. Y. S. C.*, 541). These fees are recoverable by force of statutory authority, and except when expressly fixed and given by the statute cannot be recovered (*Innes agt. Purcell, supra*; *Downing agt. Marshall*, 37 *N. Y.*, 380). The compensation to the sheriff or referee in foreclosure cases, which is called "commissions" or "percentage," was an "allowance" to be awarded by the court and subject to its discretion (*Innes agt. Purcell, supra*, p. 541). The seventy-seventh section of the judiciary act (4 *Ed. Stat.*, 578) did not give the sheriff poundage upon the bid as upon execution, but gave him an allowance out of the surplus, which with the fees should not exceed the limit fixed by the section. The amendment to section 309 of the Code of Procedure was not designed to increase the "fees" of the sheriff upon foreclosure sale. These were ample before, paying the sheriff better than he was paid for any other service as sheriff. The purpose of this amendment was to give the court power in its discretion, in a difficult and extraordinary case, to "allow" a sum which, with "fees," might amount to fifty dollars. It is given in the section providing for extra allowances, and the terms of the provision are that no greater sum than fifty dollars shall be charged by or "allowed" * * * fees, per

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centage or services, &c. The case of *Walbridge* agt. *James* (16 *Hun*, 8) is not *contra*. That case was one where the "allowance" was made in the discretion of the court, upon motion papers showing the case was difficult or extraordinary, within section 309 of the Code. In the case at bar no allowance can be made, because the proceeds of sale were insufficient to pay the mortgage debt. These allowances can in no case be taken out of the mortgage debt; and there being no "surplus" there can be no allowance. Even if this extortion was within the letter of the statute, it was plainly not intended by the legislature. The special occasion for the amendment was the "allowance" of exorbitant sums to referees in the first district. It is plain, from the form of the provision, it was not designed to increase, but was designed to limit and cut off their allowances. "A thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers" (*Innes* agt. *Purcell*, *supra*; *Holmes* agt. *Carley*, 31 *N. Y.*, 289, 290).

Rumsey & Miller, opposed.

THE COURT granted the motion, holding that under the judiciary act the poundage of the referee was limited to ten dollars, and was not increased by the act of 1876 amending section 309 of the Code.

That this amendment did not *give the right* to such fees or poundage, but was merely a *limitation* of the fees or poundage allowable, the right thereto being dependent upon other statutory provisions.

That if, as claimed by the counsel for the referee, the seventy-seventh section of the judiciary act was repealed, the referee was remitted to the three dollars per day under the general rule as to referees' fees.

Motion granted.

Walker agt. Walker.

COURT OF APPEALS.

ELIZA JANE WALKER, respondent, agt. JOSEPH WALKER,
appellant.

Under what circumstances an answer in a suit for limited divorce may be struck out.

In a suit for limited divorce on the ground of cruelty, where the defendant was ordered to pay alimony, upon which he left the state, and upon the return of precept unsatisfied an order *nisi* was made that he pay within five days or that his answer be struck out:

Held, that, on proof of default, the court had power to make an order striking out the defendant's answer, which contained a general denial, and to direct a reference to take proof as if no answer had been served.

Decided October, 1880.

THIS action was for a limited divorce on the ground of cruelty. The defendant was ordered to pay alimony, upon which he left the state. Upon the return of precept unsatisfied an order *nisi* was made that he pay within five days or that his answer be struck out. On proof of default an order absolute was made striking out his answer, which contained a general denial, and directing a reference to take proof as if no answer had been served. The defendant appealed from these orders to the general term, where they were affirmed. He then appealed to the court of appeals.

S. Hand and D. T. Robertson, for appellant.

John B. Perry, for respondent.

FOLGER, J. — The defendant, having refused or neglected to obey an important order of the court, was in contempt, and liable to punishment by reason thereof. The punishment

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inflicted by the court was by an order in the cause, to strike out the answer that had been put in by him, and to direct a reference to take proof of the matters stated in the order; the reference to proceed as if there had been no answer to put in.

It is claimed that the court had no power to make that order; that every defendant has a vested right to make a defense to any action or suit or legal proceedings begun against him, and that he cannot be deprived of it.

It is conceded by the defendant that the supreme court, on its equity side, has all the power and authority that formerly existed in chancery in England, and was continuously exercised by it. "The rule there must be the rule here," says ch. KENT, "for I take this occasion to observe that I consider myself bound by those principles which were known and established as law in the courts of equity in England at the time of the institution of this court" (*Manning agt. Manning*, 1 *Johns. Ch.*, 527-529). It is not to be denied that a court of equity may refuse to a defendant in contempt the benefit of proceedings in it, when asked by him as a favor, until he has purged himself of his contempt (*See Brinkley agt. Brinkley*, 47 *N. Y.*, 40-49, and cases there cited). But the rule has been held broader than that and enforced with much vigor. Ch. baron GILBERT lays it down in his *Forum Romanorum* (page 33), that "if the defendant appeared before the *secundum decretum*, he was liable to a *mulct*, for he could not be heard in the cause till he had cleared his contempt."

* * * It is suggested in *Cooper's cases* (*temp., Colt*, p. 209), that this is merely a statement of the practice according to the canon law. But the chief baron says, at another place (page 71), that "the answer will not be received without clearing his contempts;" and at another (page 211), "so it is where a man hath a bill depending in court, and falls under the displeasure of the court, and is ordered to stand committed. Here, when his cause is called, if the other side insist he hath not cleared his contempt, nor actually sur-

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rendered his body to the warden of the Fleet, he must do both these things before his cause can be proceeded in."

* * * It is stated by lord ELDON that it is a general rule that a party who has not cleared his contempt cannot be heard (*Vowles* agt. *Young*, 9 *Ves. Jr.*, 173; *Anonymous*, 15 *id.*, 174). The same is said with the addition of the words "in the principal case," in 2 *Comyn's Digest* (*Chy. Process, D.*), 8, citing *Practical Register in Chancery*, 217 (See, also, *Heyn* agt. *Heyn, Jacobs*, 49; *Clark* agt. *Dew*, 1 *Russ & Myl.*, 103). The rule in the chancery of Ireland is stated thus: "A party in contempt will not be allowed to oppose the relief sought by the plaintiff by contradicting the allegations of the bill or bringing forward any defense, or alleging new facts (*Anon.* agt. *Lord Gort*, 1 *Hogan*, 77; *Valle* agt. *O'Reilly*, *id.*, 199). And the rule, as thus stated, is cited and approved in *Mussina* agt. *Bartlett* (8 *Porter*, 17 *Ala.*, 277); see, also, *Rutherford* agt. *Metcalf* (3 *Hayw. [Tenn.]*, 58, 61); and in *Saylor* agt. *Mockbis* (1 *Withrow*, 9 *Iowa*, 209, 212) it is held that until the defendant had purged himself of contempt, the court might well refuse to receive his answer to the complainant's bill, or to consider the matters set up in it by way of excuse for refusal to obey the order. The reporter (*Coop. tempt., Colt*, at page 211) cites in a note the case of agt. *Lord Gort* (*supra*), and says of it: "The accuracy of some of these *dicta* may be doubted." He does not state as to which of them he queries. Many cases are collected in the note just above-mentioned. Some of them show that the rule has not been vigorously applied in later times (see *King* agt. *Bryant*, 3 *Myl. & Cr.*, 191, especially); but it does not appear that it has been abolished or abandoned entirely. It seems, too, that the authors of the Revised Statutes thought that this power resided in the English court of chancery. In preparing the sections relative to the production and discovery of books and papers (2 *R. S.*, p. 199, sec. 21, *et seq.*) they provided (sec. 26) that in case of a party neglecting or refusing to obey an order, the court might strike

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out his plea and debar him from a defense; and they sought thus to assimilate the practice to that of the court of chancery (*see rev. note, 5 Edm. Stat., 411*). The legislature gave its sanction to the proposed practice by passing into law the sections reported by the revisers. It is well to say here that *Rice* agt. *Ehle* (55 *N. Y.*, 518) does not condemn this. That case holds that the pleading may not be stricken out, save on notice to the party (*p. 523*), and that the exercise of this power was legitimate, was recognized by MARCY, J., in *Birdsall* agt. *Pixley* (4 *Wend.*, 196). The power seems to have been exerted or recognized by the supreme court in several instances, without question made by appeal (*Farnham* agt. *Farnham*, 9 *How. Pr.*, 231; *Barker* agt. *Barker*, 15 *id.*, 568; *Ford* agt. *Ford*, 41 *id.*, 169).

We are brought to the conclusion that there has long been exerted by the court of chancery in England the power to refuse to hear the defendant when he was in contempt of the court by disobeying its orders, and that that power was in the courts of chancery of this country.

We do not think that the cases of *Wayland* agt. *Tyson* (45 *N. Y.*, 282) and *Thompson* agt. *Erie Railway* (*id.*, 471), and others of like result, are in the way of this conclusion. They were not cases of contempt, nor were they equity cases. Besides, there the answer was stricken out, with no loophole left for relief to the defendant.

It is always in the power of the defendant, in a case like that in hand, to apply to the court and show that the order was irregularly made, or for leave to purge himself of the contempt and be let in again to make his defense (*Brinkley* agt. *Brinley, supra*).

The order should be affirmed.

All concur.

Clarkson *et al.* agt. Manson.

N. Y. MARINE COURT.

WILLIAM R. CLARKSON *et al.* agt. ROBERT C. MANSON.

Removal of cause from state to United States court—How amount in dispute determined—Complaint—Counter-claim.

Where the amount claimed in the complaint is less than \$500, the defendant cannot, by pleading a counter-claim exceeding that sum, remove the action from a state to the United States court for trial, upon the ground that the parties are residents of different states and the matter in dispute exceeds \$500. The amount in dispute must be determined from the complaint.

Special Term, October, 1880.

MOTION to vacate *ex parte* order removing cause to United States court.

The defendant, on a petition presented to this court, stating that the parties were residents of different states, and that the amount in dispute exceeded \$500, obtained an *ex parte* order that the action be transferred to the United States circuit court for trial. The record has not as yet been removed to or filed with the latter court, and the plaintiffs now move to set aside such *ex parte* order, upon the ground that the court was imposed upon in reference to the amount in dispute, which they allege is less than \$200. The pleadings show that the plaintiffs sue to recover \$195 for certain store fixtures sold by them to the defendant, who in defense charges fraud in the sale, and sets up a counter-claim of \$750 as the damages resulting therefrom.

John Bassett, Jr., for motion.

George H. Kracht, opposed.

McADAM, J. — The character of the action and the amount in dispute is to be determined by an inspection of the complaint (*Walsh* agt. *Darragh*, 52 N. Y., at p. 592, and see

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notes collated in 1 *Abb. N. C.*, p. 24). The amount of damages laid in the declaration is *prima facie* the amount in dispute under the removal act (*The People* agt. *The Judges*, &c., 2 *Denio*, 197). The right of removal is to be determined by the complaint and is not necessarily controlled by the answer (*Latham* agt. *Barney*, 5 *Weekly Dig.*, 145). The rule in regard to appeals from the United States district court is, that where the libellant appeals, the amount of the matter in dispute is the amount demanded in the libel (*Goodwin* agt. *Ogden*, 3 *Peters*, 34). By "matter in dispute" is meant the subject of litigation; in other words, the matter for which the suit is brought, which in this case is the recovery of \$195 for goods sold.

A defendant cannot by any plea of counter-claim deprive the state courts of their lawful jurisdiction, for, as a rule, he is not obliged to present his counter-claim to the state court; he may prosecute it in any forum having jurisdiction of the subject-matter and parties, and may waive, withdraw or discontinue it at pleasure.

The amount claimed in this action being less than \$500, the plaintiffs could not have commenced their action in the United States circuit court (*See Abbott's U. S. Pr.*, vol. 1, p. 7, title *Jurisdiction*). They were obliged to sue in the state court. To say that the defendant under such circumstances can, by pleading a counter-claim exceeding \$500 in amount, not only divest the state court of its jurisdiction, but confer upon the United States circuit court a jurisdiction it did not possess when the action was commenced, is too illogical to require serious notice.

The pleadings properly construed show that the defendant not only endeavors to avoid paying the agreed \$195 for fixtures sold to him, but seeks to bring the plaintiff in his debt \$750, because the fixtures were not as represented; and this counter-claim the defendant audaciously claims deprives this court of jurisdiction, because the parties to the record are residents of different states.

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The petition presented to this court falsely represented that the amount in dispute exceeded \$500, and the court was thereby imposed upon and induced to grant an order it had no power to make.

The case is still here. This court has no power to transfer it to the United States circuit court, and that court has no power to receive it. The *ex parte* order purporting to transfer it to that court will, therefore, be vacated, with ten dollars costs.

SUPREME COURT.

THE ULSTER COUNTY SAVINGS INSTITUTION agt. THE FOURTH
NATIONAL BANK OF THE CITY OF NEW YORK.

Removal of cause — When “the matter in dispute” cannot be said to arise under the “laws of the United States.”

It seems, that when a federal corporation brings a suit in which the pleadings do not negative the possibility of the issue arising as to its legal existence, as it places itself in a position where its legal existence and its rights under its charter may be questioned, it may be truly said that matters in dispute under the constitution and laws of the United States arise.

But this is not so when the federal corporation is a defendant, when its corporate life is admitted, and when the pleadings affirmatively show that the cause of action and the defense depend upon state and not Federal statutes.

It is not enough that a party is a creation of the law of the United States to deprive the state court of jurisdiction, but *the matter in dispute* in the action must arise thereunder.

Where, as in this case, *the matter in dispute* arises out of state and not federal laws, the state courts cannot be deprived of jurisdiction.

Special Term, September, 1880.

MOTION to remove the above entitled cause into the circuit court of the United States for the southern district of New York.

Ulster County Savings Institution agt. Fourth National Bank.

L. J. Wilcox, for motion.

W. S. Kenyon, Jr., opposed.

WESTBROOK, *J.* — The plaintiff is a corporation formed under the laws of the state of New York, located at and doing business as a savings bank in the city of Kingston, Ulster county, in said state.

The defendant is a corporation formed under the laws of the United States and transacting a general banking business in the city of New York. The existence of the defendant as a Corporate Being is averred in the complaint and admitted by the answer.

The plaintiff by its complaint seeks to recover of the defendant the sum of fourteen hundred and forty dollars, with interest from April 11, 1878, which sum it alleges to be due and owing to it on account of moneys deposited by it with the defendant, with which it is averred "the plaintiff has heretofore kept and still has an account," and which sum, so claimed, the defendant has, on demand, refused to pay.

The defendant admits by its answer the allegation that it had acted as the financial agent of the plaintiff in the city of New York, but alleges the payment in full by it to the plaintiff of all moneys deposited by the said plaintiff with the defendant. It further sets up, by way of counter-claim, that the plaintiff, about the 6th of December, 1877, delivered to the defendant, for sale through its correspondent in the city of New Orleans, in the state of Louisiana, "certain certificates of stock in the Crescent City Railroad Company, representing that one Budington, as the administrator of H. J. Budington, deceased, was the owner and holder thereof;" that the defendant sent said stock to its correspondent in New Orleans, the Germania National Bank, which sold the same at the price directed by the plaintiff, and promised and agreed to deliver and transfer said stock to the purchaser. That said Budington was not the owner of said stock, and the Crescent

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City Railroad Company refused to transfer the same for that reason, so that the said Germania Bank could not deliver such stock to the purchaser, who thereby sustained damages to the amount of \$1,440, which the said Germania Bank paid to him about the 20th of December, 1877, in discharge of its liability; which sum of money the defendant was obliged to repay and did repay to said Germania Bank; and it therefore asks that the said sum of \$1,440, with interest from December 20, 1877, "be set off against the plaintiff's demand to the extent thereof."

The reply denies each of the facts constituting the counterclaim, and further alleges that the plaintiff was not in fact interested, and could not be according to the laws of this state, in any of the transactions out of which the alleged counterclaim arose, and the parties with whom the defendant really dealt therein are disclosed. Other matters are also set out in the reply, but they are immaterial for the purposes of this motion.

The defendant moves under section 2 of the act of Congress of March 3, 1875, to transfer this action to the circuit court of the United States for the southern district of New York, upon the ground, as alleged in the moving papers, that "this suit and the matters in dispute therein arise under the laws of the United States."

The act referred to certainly authorizes the removal of "any suit of a civil nature, at law or in equity, now pending or hereafter brought, in any state court, where the *matter in dispute* exceeds, exclusive of costs, the sum or value of \$500, and *arising under the Constitution or laws of the United States*," etc.; but I confess my inability to see how "the matter in dispute" in this action arises under the "laws of the United States." It is true that the defendant owes its corporate life to a law of Congress, but such life being conceded, it must be shown that "the matter in dispute"—*i. e.*, some issue in the action—arises under the Constitution or laws of the United States.

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If the existence of the defendant was questioned, or its power under its charter to do any act in controversy was denied, it might be plausibly argued that "the matter in dispute" arose under a law of the United States. The pleadings, however, affirmatively show that no question of the character just referred to can possibly arise, and that all disputed points are controlled by state laws. The issue in the action is plainly upon the counter-claim of the defendant, and that depends upon proof of facts which no Federal law controls, either as to the mode of giving the same or as to its effect when given. If, therefore, this action is to be transferred from the state court it must be upon the simple ground that it is a corporation created under a law of congress. Should the removal asked for be granted for any such reason?

The case of the *Union Pacific Railroad Company* agt. *McComb* (1 *Federal Reporter*, 799) is relied upon as decisive of this question, but I cannot so regard it. That was an action by a corporation created under the Federal statutes; and of such an action judge BLATCHFORD says: "Under the principles laid down in the decision in *Osborn* agt. *Bank of the United States* (9 *Wheat.*, 738, 819) it must be regarded as settled that a suit by a corporation created by the United States is a suit arising under the laws of the United States." Possibly, *though this is not fully conceded*, when a Federal corporation brings a suit in which the pleadings do not negative the possibility of such an issue, as it places itself in a position where its legal existence and its rights under its charter may be questioned, it may be truly said that matters in dispute under the Constitution and laws of the United States arise. But this argument cannot be made when the Federal corporation is a defendant, when its corporate life is admitted, and when the pleadings affirmatively show that the cause of action and the defense depend upon state and not Federal statutes. The case of the *United States Bank* agt. *Osborn* (9 *Wheat.*, 738) was an action brought to restrain the collection of a state tax imposed upon the bank; and that was

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so obviously a case depending upon the Constitution and laws of the United States that the soundness of that decision cannot be questioned. The opinion in that cause, however, cannot be carried so far as to hold that when Federal corporations have contracted with citizens of a state or with its corporations, and have had dealings with them under state laws, that the latter must pursue their remedies in the federal courts. So to hold would be a surrender of state rights to an extent which could not be tolerated. No better answer can be given to this position than the remarks in the opinion of the late chief justice CHURCH, in *Cooke agt. State National Bank of Boston*, (52 N. Y., 96; see pages 108, 109), which, after combating such a proposition, are as follows: "If the Federal legislature may create corporations for the transaction of the banking business of the country, and confine all legal proceedings by and against them to Federal courts, it requires only another step in the same direction to create corporations for the transaction of railroad, telegraph, express and manufacturing business, and thus to usurp control over the whole business of the country and the internal affairs of the states, absorbing the judicial functions of state courts and reducing the states themselves to mere governmental skeletons without power or vitality, a result which no friend of the Constitution or of republican institutions can desire."

It would not be difficult to prove that any Federal law which assumed to transfer to the Federal courts all suits against corporations created under Federal laws would be unconstitutional. That question, however, does not arise, as the statute relied upon for the transfer undertakes no such impossibility. It allows the transfer when "the matter in dispute" arises "under the Constitution or laws of the United States," and in the language quoted the act gives the true construction to that provision of the Constitution of the United States (*section 2, article 3*) which declares the judicial power of the United States "shall extend to all cases in law and equity arising under this Constitution, the laws of the United States," &c.

Shaw agt. McCarty.

It is not enough that a party is a creation of the law of the United States to deprive the state court of jurisdiction, but "the matter in dispute" in the action must arise thereunder. That "the matter in dispute" in this cause arises out of state and not Federal laws is clear; and the motion is therefore denied, with costs.

N. Y. MARINE COURT.

JULIA A. SHAW agt. JOHN McCARTY.

Summary proceedings—Illegal trade.

Where a tenant knowingly sub-lets a portion of the demised premises for a policy shop, the lease of the tenant may be annulled by the landlord, and the tenant may, under the statute in reference to illegal trades, be removed by summary proceedings, the same as if he were an overholding tenant.

After the forfeiture has once attached, it cannot be discharged by the tenant abating the nuisance. The reasons stated.

Special Term, October, 1880.

MRS. JULIA A. SHAW commenced proceedings in the marine court against her tenant, John McCarty, to cancel his lease of the Rapid Transit Hotel, in East Forty-second street, near the Grand Central Railway Depot, and to eject him from the premises for sub-letting the basement of the hotel for a policy shop, in violation of the statute.

E. P. Wilder, for landlord.

Joseph Ullman and *Charles Crary*, for tenant.

McADAM, J. — The statute under which this proceeding is authorized provides that whenever the lessee or occupant of demised premises shall use or occupy the same, or any part thereof, for any illegal business, the lease or agreement for

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the letting or occupancy of such premises shall thereupon become void and the landlord may re-enter, &c. (1873, *chap.* 583), and substantially the same language is employed by the Code of Civil Procedure (*sec.* 2231). The tenant did not personally use the demised premises for any illegal trade, but he sub-let the basement thereof to one Lampson as a "policy shop," an illegal trade or business within the meaning of the statute (*See 3 R. S. [6th ed.], 922*). It was used as a place for the sale of tickets, numbers and slips, in the scheme of drawing lottery prizes, and was frequented by hackmen, boys and colored people who patronized the game. The evidence satisfies me that McCarty knew all about Lampson's antecedents, and the business he was to carry on from the time he first negotiated for the basement, so that these facts must be found in favor of the landlord.

The occupation by Lampson, under such circumstances, by force of the statute, made McCarty's lease void, at the option of his landlord or of his assigns (*See The People agt. Bennett, 14 Hun, 63*).

The lease being nullified, the landlord was authorized by statute to take the same remedies to recover possession of his premises as are given him by law in a case of a tenant holding over after the expiration of his lease. The assignee of the landlord has therefore resorted to this remedy (*Code, sec.* 2235). He has done nothing, since the lease was so annulled, which operates in law as a waiver of the statutory right. On the contrary, he promptly commenced proceedings before justice LANGBEIN, in the seventh district court, but that justice dismissed the proceedings because they were, in his judgment, prematurely brought.

The tenant's counsel claims that the dismissal is a bar to these proceedings. The objection, however, is untenable (*Dexter agt. Clark, 35 Barb., 271; The People agt. Vilas, 36 N. Y., 460*).

The tenant's counsel also claims that before the present proceeding was commenced, the tenant induced Lampson to

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leave the basement, and that by this means the nuisance has been abated, and the object of the statute satisfied. But the statute goes further; it imposes, as a penalty for its infraction, that the lease for the letting and occupancy of the premises shall become void. If it becomes void at the option of the landlord or his assigns, it may be competent for them to waive the forfeiture, but I am at a loss to discover how the party who has incurred the penalty, can by any act of his (however meritorious) discharge it. The statute was aimed at what the legislature regarded as a growing evil, and by its terms the person offending against its provisions forfeits his lease. The landlord in the present proceeding insists upon the forfeiture.

The tenant herein has incurred the penalty, and although the statute is highly penal, I must enforce its mandates. The landlord is therefore entitled to judgment for possession.

NOTE. — The tenant subsequently obtained an injunction in the supreme court, to restrain the issuing of the warrant upon the above judgment. A motion to continue the injunction was made, and on the 1st day of November, 1880, denied, and the following decision rendered :

Charles Crary and Joseph Ullman, for motion.

E. P. Wilder, opposed.

LAWRENCE, J.—I am of the opinion that the learned justice of the marine court was right upon the facts and the law in this case, and that the injunction heretofore issued should not be continued. The temporary injunction is therefore dissolved.—[Ed.]

Williams agt. Cassady *et al.*

SUPREME COURT.

ANDREW J. WILLIAMS agt. ROBERT J. CASSADY *et al.*

Costs — when, and when not, defendants who sever in their defenses, and all succeed, are entitled to several bills of costs.

Defendants who sever in their defense, and all of whom succeed, are entitled to several bills of costs, unless, however, such severance be in bad faith and to increase costs.

Thus, if persons actually partners should sever in defending an action on a partnership liability, or if one defendant should defend by an attorney, and another by the attorney's clerk, these would be cases of bad faith. The defendants, R. C. and J. C., were brothers, but when sued they had no joint business relations, although they had been, at a previous time, in business together: J. C. was a non-resident, having gone from the state to avoid creditors. All the property was in the hands of R. C., the other defendant. The summons was served on J. C. by publication; there could be no personal service upon him, and there was no property subject to attachment. The retainer of R. C. is in the handwriting of the attorney for J. C. The answers are indetical, that of J. C. being copied and verified in the office of the attorney for R. C. The attorney for J. C. stated that he received a letter from J. C. about the fifteenth of April requesting him to appear. But he does not state that he had not himself previously written to J. C.:

Held, that the defendants had the right to appear by different attorneys and interpose separate defenses, and having succeeded on the trial they were entitled to separate bills of costs under section 805 of the Code as matter of law, subject, however, to the power of the court to confine them to one bill in case it should be made to appear that they had made their separate defenses collusively to enhance costs.

Held, further, that, taking all these matters into consideration, and seeing the uselessness of this severance, or perhaps of any defense by J. C., the severance of defendants was not in good faith, and they should be confined to one bill of costs.

Third Department, General Term, September, 1880.

Before LEARNED, P. J., BOCKES and FOLLETT, JJ.

LEARNED, P. J.—The case of *Allis* agt. *Wheeler* (56 N. Y., 50), while it overruled the case of *Daniel* agt. *Lyon*

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(9 *N. Y.*, 549), does not seem to touch the present question. The opinion holds that section 306 (*old Code*) establishes "the conditions upon which one or more of several defendants might recover costs against a plaintiff *who should recover against other defendants.*" And such is the clear meaning of that section. The words "when the plaintiff fails to recover judgment against *all*" do not mean "when the plaintiff fails to recover judgment against *any*." They mean when the plaintiff recovers against *one* and not against *all*, with reason, because then the plaintiff has shown that he had *some* right of action, therefore the question of costs is left discretionary.

In the present case the question rests not on section 306 but on sections 304 and 305, and the law applicable thereto. In *Atkins agt. Lefever* (5 *Abb. [N. S.]*, 221) the defendants had appealed by the same attorney. The court expressly refused to pass on the rule which should prevail if the defendants should sever.

Section 303 explains that costs are sums allowed to the prevailing party by way of indemnity of his expenses in the action. In the present case the defendants were not partners as has been found by the referee.

The plaintiff sued them as partners on an alleged joint liability. Each had a right to defend. They were under no obligation, either at law or in fair dealing, to unite in their defense.

If A and B, having in fact no joint or common interest, are sued as jointly liable, neither of them is bound to intrust his defense to the attorney selected by the other. One may even defend in person. If costs are to indemnify, why should not each be entitled to the indemnity? If not, which is to be indemnified? We see no reason why section 305 does not give in such a case costs to every defendant appearing and answering separately and in good faith.

It is not necessary to say that this view would authorize two persons actually parties to sever in their defense and to recover separate costs.

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A severance by partners might be so evidently in bad faith that it could not be permitted, because a partner who retains an attorney in an action against the firm may be said to retain him for all of the firm.

In *Albany and West Shore Railroad agt. Cady* (6 Hill, 265) the defendants had appeared by the same attorney and had filed separate pleas. The action was for tort.

The court said, that so far as torts were concerned the case was substantially as though both defendants were acquitted. That they could tax only one bill, but that both should recover for the *separate* services, viz., for the pleas.

In *Ten Broeck agt. Paige* (6 Hill, 267) two defendants had appeared by different attorneys. The action was tort. Each was entitled to a full bill of costs so far as the services were separate; but as to the services, which were alike for both, there should be but one taxation. The court speaks of the severance as having been "without any improper motive" (*See, also, the following case in the same volume*).

It is true that these were cases of tort, but there seems to be no difference in principle between tort and a case where, in an action on contract, there is in fact no joint interest between the defendants.

This last case is recognized in *Perry agt. Livingston* (6 How. Pr., 404), which was an action on contract. There the court said that defendants who succeed, and who have severed in the defense and appeared by separate attorneys, are entitled to separate bills of costs. But in that case such separate bills were refused on the ground that there was not a *bona fide* separate appearance (*See, also, Collomb agt. Caldwell*, 5 How. Pr., 336).

The present case is not an action in equity, therefore the report of the referee that the defendants recover costs is of no force. They are entitled to costs, or not so entitled, according to rules of law and not according to the judgment of the referee.

It seems to us, therefore, that defendants who sever in their

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defense, and all of whom succeed, are entitled to several bills of costs, unless, however, such severance be in bad faith and to increase costs. Thus, if persons actually partners should sever in defending an action on a partnership liability, or if one defendant should defend by an attorney and another by the attorney's clerk, these would be cases of bad faith.

In the present case, James Cassady was a non-resident, having gone from the state to avoid creditors. All the property was in the hands of Robert Cassady, the other defendant. The summons was served on James by publication. There could be no personal service against him and there was no property subject to attachment. At least this is a fair conclusion on a comparison of the affidavits. The retainer of Mr. Sawyer for Robert is in the handwriting of Day, the attorney for James. The answers are indetical. That of James was copied and verified in the office of the attorney for Robert. The attorney for James stated that he received a letter from James about the fifteenth of April, requesting him to appear. But he does not state that he had not himself previously written to James. Taking all these matters into consideration and seeing the uselessness of this severance, or perhaps of any defense by James, we do not think that the severance of defendants was in good faith.

The part of the order appealed from should be affirmed with ten dollars costs and disbursements.

BOOKES, J. — The defendants had the right to appear by different attorneys and interpose separate defenses; and having succeeded on the trial they were entitled to separate bills of costs, under section 305 of the Code, as matter of law, subject however to the power of the court to confine them to one bill in case it should be made to appear that they had made their separate defenses collusively to enhance costs. The exercise of this power by the court, for collusion and fraud on the practice of the court, has been indulged during a long period of time, notwithstanding the peremptory lan-

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guage of the statute awarding costs to successful parties. It has for its basis an alleged fraud upon the law giving costs. By the record in this case, as it stood when the costs were adjusted by the clerk, the defendants, having interposed separate defenses, were entitled to separate bills; not because the referee had so awarded costs, but because, under section 305 of the Code, they were entitled to the costs of their separate defenses as matter of law (*Board of Supervisors agt. Bristol*, 58 *Hmv.*, 3). But it was open to the plaintiff to move the court for an order limiting the defendants to one bill, on the ground that the separate defenses were interposed unnecessarily and collusively; that the practice adopted was unjust and a fraud upon the law. The clerk had no right to determine this question. He could exercise no judicial power in granting or refusing the costs of the action to any party. The suggestion to the contrary, in *Haye agt. Robertson* (38 *N. Y. Sup. Ct.* [6 *Jones & Spencer*], 59), is, as I think, untenable. It was for the party alleging collusion to move the court for the relief he desired to obtain, the case on the record standing against him. The decision of the special term in this case, to the effect that before the defendants could have their separate bills taxed by the clerk they must obtain an order from the court permitting it, was erroneous. The decision of the special term was put on this ground only. If the case came within the purview of section 306 of the Code, the rule would be as declared by the special term. But it is shown in the opinion of LEARNED, P. J., herein, that section 306 has here no application.

The question whether the separate defenses were collusively interposed in this case to enhance costs was not considered by the special term. Such, however, being the real and true question presented by the motion, this court should now examine it to the end that the merits of the motion be determined by a proper order. Then is it made to appear satisfactorily on the papers submitted that the defendants needlessly and collusively severed in their defenses, simply to enhance costs?

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I have had great difficulty in joining with my brothers LEARNED and FOLLERT in giving an affirmative answer to this question. As above stated, each had the right to employ his own attorney. They were not jointly liable on the claim on which they were prosecuted. This fact was established on the trial. They were not united in interest in their defenses. They were brothers, it is true, but when sued they had no joint business relations, although they had been at a previous time in business together, and it is claimed that the circumstances attending the copying and service of the answers from the office of the attorney for one of the defendants, are shown to have been matters of mere accommodation between the attorneys.

As it seemed to me, this case was unlike one wherein separate defenses were interposed by the same attorney, or wherein attorneys who were partners each answered separately for different defendants, or where the attorneys occupied the same office, or where one attorney answered for one defendant and his law clerk answered for another. In such cases collusion to obtain double costs may well be inferred, and such are the circumstances attending most of the cases in the books wherein defendants, who interposed separate answers by different attorneys, have been limited to a single bill of costs. The cases bearing on this question are nearly all cited in *Atkins* agt. *Lefever* (5 *Abbott* [*N. S.*], 221, 222). For cases not there referred to, see *Pierce* agt. *Brown* (40 *N. Y. Sup. Ct. R.* [8 *Jones & Spencer*], on page 399) and *Milligan* agt. *Robinson* (58 *How.*, 380). The last case cited is not in point, however, as that was an equity case and the referee awarded costs to the defendants; the granting or withholding of costs resting in his discretion. In order to defeat the defendant's claim to separate bills, it must be made to appear that the separate defenses were interposed collusively, simply to enhance costs. This is the question here, and my brothers LEARNED and FOLLERT have reached the conclusion that the separate defenses were in this case so interposed, and with

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that conclusion I am inclined to concur, but not without hesitation and some reluctance.

It cannot be denied that there are some facts and circumstances on which this conclusion may be based.

U. S. CIRCUIT COURT.

ERNEST STEIGER agt. JOHN H. BONN.

Summons — When should be set aside on ground that defendant was induced to come within the jurisdiction of the court by deceptive and fraudulent means for the purpose of serving him.

Where the defendant, residing in another district, is enticed and induced to come into the district where the plaintiff resides by the false representations or deceptive contrivances of the plaintiff, or of any one acting in his behalf, for the purpose of serving legal process upon him, and the same is served through such improper means, such service is illegal and ought to be set aside and the process should be dismissed.

Where the defendant had been brought from New York to Newark, New Jersey, by a forged telegram, and on his arrival he was served with the summons or writ by the Deputy United States Marshal, who had been engaged by plaintiff to make such service:

Held, that although there is no pretense that the deputy marshal had any knowledge of the forged telegram, yet the undisputed facts make such a presumption against the plaintiff or his agent, who accompanied the officer, that he is called upon to rebut them with proof that he was not privy to the deception practiced upon the defendant.

District of New Jersey, October, 1880.

MOTION to set aside writ, &c.

J. Henry Stone, for defendant.

Attorney-General Gilchrist, for plaintiff.

NIXON, J.— This is a motion to set aside the summons issued in the case, on the ground that the defendant was induced by deceptive and fraudulent means to come within

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the jurisdiction of the court for the purpose of serving the writ upon him. There seems to be a substantial agreement between the counsel of the respective parties as to the law of the case. They assent to the rule laid down by Mr. justice CLIFFORD in the *Union Sugar Refinery* agt. *Mathiesson* (2 *Cliff.*, 309), where he says: "That where the defendant, residing in another district, is enticed and induced to come into the district where the plaintiff resides, by the false representations or deceptive contrivances of the plaintiff, or of any one acting in his behalf, for the purpose of serving legal process upon him, and the same is served through such improper means, such service is illegal and ought to be set aside, and that the process should be dismissed."

The only question is, whether the facts shown are sufficient to identify the plaintiff with, and hold him responsible for the deception and fraud used to lure the defendant into the state.

The facts are, that the defendant is a citizen of the State of New York, residing in the city of New York, and engaged in the business of importing, publishing and selling school-books in the German language; that a convention of the German-American Teachers' Association — a body composed of German teachers from various states of the Union — was to be held on the twenty-eighth, twenty-ninth and thirtieth days of July last, at the High School building in the city of Newark; that many of the members of this association were customers of the defendant, and in the habit of purchasing books of him; that the plaintiff and defendant had a law suit then pending in the supreme court of the state of New York, growing out of some business transactions between them; that the plaintiff, desirous of removing said controversy into this jurisdiction, and conceiving the notion that the defendant would attend the sessions of the German School Association at Newark, procured a summons from this court and took it to the United States deputy marshal at Jersey City; gave him instructions in regard to its service on the twenty-eighth of July and introduced to the marshal a gentleman, whose name is not known,

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who knew the defendant by sight, and who was to accompany the officer to Newark to designate to him the defendant; that they went to Newark on the afternoon of the twenty-eighth and were joined by another man, called "Charley," who was also to aid the marshal in identifying the defendant; that they visited the convention on the twenty-eighth and twenty-ninth of July, but failed to find the defendant, one of the men paying the officer for his attendance on the last named day, and promising to give him notice if his attendance was desired on the next day; that he was notified to meet these men at Newark on the afternoon of the thirtieth, when the defendant was found and the writ served; that the defendant visited New Jersey in consequence of having received, at his place of business in the city of New York, at about one o'clock P. M. of that day, a telegram of the following tenor:

"NEWARK, *July* 30, 1880.

To E. STEIGER, 25 Park place, New York:

Please call at headquarters of German-American Teachers, at 842 Broad street, this afternoon.

(Signed)

W. I. ECKOFF."

That the W. I. Eckoff, whose name was signed to the telegram, was a German teacher, and president of the convention then assembled at the place designated, with whom the plaintiff had a casual acquaintance; that the telegram was not sent by the said Eckoff, nor by anyone in his behalf, and it was doubtless forwarded by some one to bring the defendant within this jurisdiction.

If the plaintiff, or anyone acting in his behalf, was instrumental in decoying him hither by the use of such a device, it must be held that the writ should be quashed and the suit dismissed. But if other persons, not connected with the plaintiff, procured his attendance, even by these improper methods, for any purpose, the plaintiff has the right to avail himself of the opportunity of serving the writ — the defendant is found in the district in the sense in which the term is used in the

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eleventh section of the judiciary act (*sec. 739, R. S.*), and the plaintiff is not chargeable with any deception or fraud practiced by those over whom he has no control and for whose actions he is not responsible. Such I understand to be the substance of the opinion of the court in the case of the *Union Sugar Refinery* agt. *Mathiesson* (*supra*).

The question involved must be decided by ascertaining upon which party the burden of proof lies. There is no pretense that the deputy marshal had any knowledge of the forged telegram. Do the undisputed facts make such a presumption against the plaintiff or his agent, who accompanied the officer, that he is called upon to rebut them with proof that he was not privy to the deception practiced upon the defendant?

I am of that opinion. The presumption of the plaintiff's participation in the deception is stronger here than in the case of *Hevener* agt. *Heist* (30 *Leg. Int.*, 46), and yet in that case the court set aside the writ. The defendant had been brought to Philadelphia, from Bucks county, Pennsylvania, by a forged telegram, and on his arrival he was served with the writ by the deputy sheriff. Judge SHARSWOOD thought the burden of proof was upon the plaintiff to explain how the officer knew that the plaintiff was coming. There was no evidence as to who sent the telegram, and yet the learned judge held that the failure of the plaintiff to show that he did not direct the officer in the service was fatal to the legality of the proceedings. "I am clearly of the opinion," he says "that it was incumbent on the plaintiff to produce the sheriff's deputy who made the arrest, in order to show that it was not by the instruction of the plaintiff or his attorney, that he went with the writ at that time to that place to arrest the defendant."

The evidence is uncontradicted that the deputy marshal did go at the time and place designated by the agent of the plaintiff to make the service of the summons, and there is no disavowal on his part that he procured the presence of the defendant then and there.

The writ must be set aside.

The People *ex rel.* O'Donnell agt. McNally.

SUPREME COURT.

THE PEOPLE *ex rel.* O'DONNELL agt. JAMES McNALLY and others.

Elections — Naturalization — Citizenship — Proof of — When secondary evidence may be resorted to.

Where a person asking to be registered claims to be a citizen by virtue of the naturalization of his parents, the best evidence of the naturalization of the parent would be the original certificate of naturalization, or a duplicate thereof, when it can be obtained. But a party may, in the matter of proving his citizenship, resort to secondary evidence when preliminary evidence cannot be obtained.

Where the relator stated to the inspectors, under oath, that he was born in Ireland and is of full age ; that he came to this country when he was about five or six years old ; that his father was a citizen as early as 1853, and that he has seen his father vote, but is unable to give the date of his father's certificate of naturalization, although he had seen it ; that the relator has voted in this city for the last fifteen years, and that he claimed the right to be registered on the ground of his father having been naturalized long before the relator became of age ; that his father had been dead for over twenty years :

Held, that in the absence of anything impeaching the relator's testimony, his oath is *prima facie* evidence of the truth of his statements, and a case is made out in which it is impossible for the person seeking registration to produce the certificate of naturalization of his father.

Held, further, that in such a case the party is entitled to the benefit of secondary evidence to establish his right to vote, and that the alleged elector is just as competent to prove that fact as he is to prove that he is a native born citizen, is twenty-one years of age, his place of birth, his residence and that he has lived for the requisite time in the state, county and election district.

Special Term, October, 1880.

THIS is an application for a *mandamus* to compel the election inspectors of the twenty-first election district of the first assembly district to register the name of the relator.

George W. Wingate and *E. Ellery Anderson* for relator.

Elihu Root, for respondent.

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LAWRENCE, J. — Upon examining the affidavits in this case, I am of the opinion that the inspectors should register the name of the relator. No specific provision appears to be made in the registration act as to the manner in which those who claim to be citizens by virtue of the naturalization of their parents shall be registered. In such cases, of course, the best evidence of the naturalization of the parent would be the original certificate of naturalization, or a duplicate thereof, when it can be obtained. But I do not understand that a party may not, in the matter of proving his citizenship, resort to secondary evidence when preliminary evidence cannot be obtained ; and in the absence of any express provision in the statute to the contrary, I am not prepared to hold that such evidence may not be resorted to. The case stands, as to the facts, as follows: The relator stated to the inspectors, under oath, that he was born in Ireland and is of full age ; that he came to this country when he was about five or six years old ; that his father was a citizen as early as 1853 ; and that he has seen his father vote, but is unable to give the date of his father's certificate of naturalization, although he had seen it ; that the relator has voted in this city for the last fifteen years ; and that he claimed the right to be registered on the ground of his father's having been naturalized long before the relator became of age. He also stated to the respondents that his father has been dead for over twenty years.

I do not understand that it is denied by the respondents that such statements were made by the relator, under oath, to them ; but they aver that no evidence of citizenship was submitted to them by the relator in compliance with the requirements of chapter 675 of the laws of 1872, and that he declined to give any proof of his father's citizenship other than the statement that he knew that his father was a citizen, or to give any evidence as to when, where, or in what court, or before what officer his father was naturalized, or to produce any elector to testify as to his qualifications as an elector. Now, I agree with the relator's counsel that in the absence of any-

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thing impeaching the relator's testimony, his oath is *prima facie* evidence of the truth of his statements. If his testimony is true, a case is made out in which it is impossible for the person seeking registration to produce the certificate of the naturalization of his father. Should he then lose his right to vote if, in point of fact, his father was a naturalized citizen?

Such I do not believe to be the proper construction of the law. I think that in such a case the party is entitled to the benefit of secondary evidence to establish his right to vote, and that the alleged elector is just as competent to prove that fact as he is to prove that he is a native born citizen, is twenty-one years of age, his place of birth, his residence and that he has lived for the requisite time in the state, county and election district. The supreme court of this state held, in the case of *The People agt. Pease* (30 *Barbour's R.*, 588), that the boards of inspectors are not judges, nor do they exercise a judicial power in receiving or in counting votes. Justice ALLEN, in his opinion in that case, says: "They cannot summon witnesses or impanel a jury, or give the party interested a hearing. They can examine the proposed elector upon his oath, and there their power and means of judicial investigation cease; and it would be strange indeed if their conclusions should be final as against the state and all interested." And again he says: "The elector is made the judge of his own qualifications, and his conscience takes the place of the judgment and decision of every other tribunal for that occasion. The inspectors may probe his conscience, and instruct and advise, but they cannot decide upon his qualifications." Again, by section 64 of the act of 1872, as amended, fraudulent registration, or an attempt or offer to register in any election district by any person not having a right to register therein, is made a felony, and the punishment prescribed for the offense is imprisonment in a state prison for not less than one nor more than five years. When any party, therefore, applies to be registered, he does so only under the responsibility of his oath, but he cannot obtain an illegal registration

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without committing a very grave crime, for which he is subject to severe and odious punishment.

Under such circumstances, when there is nothing before the court which tends to impeach the relator's oath, it should not be assumed to be false.

For these reasons I am of the opinion that the relator is entitled to a *mandamus* commanding the respondents to place his name upon the list of voters of the twenty-first election district of the first assembly district.

SUPREME COURT.

N. DANE ELLINGWOOD agt. CHARLOTTE BEARE, executrix, &c.,
and others.

Will—construction of—When accumulated income arising under a trust goes to those entitled to the principal sum from which the income was derived.

Where the testator, by his will, gave his son T. H. S. \$10,000, in trust, and directed him to put the same at interest on good security, and with the interest thereof, or so much as might be necessary for that purpose, to support and maintain the testator's daughter, A. S., in a decent and comfortable manner, or at his discretion to give and pay to her annually the whole of the interest thereof; and, at her decease, the testator gave the said \$10,000 to all the children of A. S., then living, equally, but if she should die without lawful issue then living, the will gave the same, equally, to his son, daughter and grandson, naming them, and to their legal representatives, respectively. A. S. was a lunatic and so remained until her death. She died without issue. The income of the \$10,000 was more than sufficient to pay for her proper support, and several thousand dollars of unexpended income had accumulated at the time of her death in the hands of the trustee:

Held, that accumulated income, arising under the facts above indicated, should go to those entitled to the principal sum from which the income was derived; that as to this fund of \$10,000, which had been carved out of his estate by the testator and distinctly set apart to be invested, and which after the death of his daughter was to be paid to the persons

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named by him, the same should carry with it to the legatees the interest or income which it had earned, and which was not expended for his daughter's maintenance.

Special Term, June, 1880.

N. Dane Ellingwood, plaintiff, in person.

Evarts, Southmayd & Choate, for defendants.

VAN VORST, J. — The testator, by his last will and testament, gave his son, Thomas H. Smith, Jr., ten thousand dollars in trust, and directed him to put the same at interest on good security, or to invest the same in bank stock, at his discretion, and with the interest thereof, or so much thereof as might be necessary for that purpose, to support and maintain the testator's daughter, Ann Smith, in a decent and comfortable manner, or at his discretion to give and pay to her annually the whole of the interest thereof; and at her decease, the testator gave the said ten thousand dollars to all the children of Ann Smith then living, equally; but if she should die without lawful issue then living, then and in such case the will gave the same equally to his son Thomas H. Smith, his daughter Eliza Hall and his grandson Nathan Dane Ellingwood, and to their legal representatives respectively.

Ann Smith was a lunatic, and so remained until her death in 1871. She died without issue. The income of the ten thousand dollars was more than sufficient to pay for her proper support, and several thousand dollars of unexpended income had accumulated at the time of her death in the hands of the trustee, and the question which is submitted for decision is, to whom does this surplus belong?

The arguments submitted by the counsel for the various claimants have been carefully considered, and the following is the result reached:

That accumulated income, arising under the facts above indicated, should go to those entitled to the principal sum from which the income was derived.

In *Johnson agt. Graham* (6 Vesey, 239) it was said that in

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cases where the whole interest or income is not given, but a provision for maintenance and support thereout only is made, "that nothing more than a maintenance can be called for; what can be shown to be necessary for maintenance, however large that interest may be; and therefore what is not taken out of the fund for maintenance must follow the fate of the principal, whatever that may be."

In *Craig agt. Craig* (8 Barb. Ch'y, 76, 93) a provision had been made by the testator for the maintenance of a lunatic son, in terms very similar to those in the will under consideration. The chancellor held that "if there is a permanent surplus, or if any surplus is likely to remain permanently on hand because it is not wanted for the support of the lunatic, it must be distributed among those who were presumptively entitled to the capital of the fund out of which such surplus income arose when the same accrued," and see *The Atty. Gen. ex. rel. Marselos agt. The Minister and Elders of the Dutch Reformed Church* (36 N. Y., 452), in which last cited case it was held that the surplus income follows the "legal title" (*Elborne agt. Good*, 14 Sim., 175; *In re Sanderson's Trust*, 3 Kay and Johnson, 407).

The general conclusion above reached disposes of all claims adverse to those to whom is given the capital of the fund under the terms of the will. But in detail it may be said, with respect to the right to those accumulations interposed by the next of kin of Ann Smith, that she had no absolute right to the whole income. Had that been the case, as was said by the chancellor in *Craig agt. Craig* (*supra*), the surplus of any year should have been invested for her benefit, and upon her death the claims of her next of kin would be regarded. But, as has been seen, the testator did not give the whole income to his daughter, or direct it all to be applied for her support, whatever it might be. What he meant was, that his daughter should be maintained out of this income, and what was needed for such purpose was given, but the amount

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thereof so to be applied was to be determined by the judgment, and was left to the discretion of the trustee.

To the residue of the income, over and above what was necessary for her support, so to be determined, the *cestui que trust* could have no legal or equitable claim, nor can any be interposed through her. This distinction was clearly drawn by the chancellor in *Bryan agt. Knickerbocker* (1 Barb. Chy., 409). In the course of his opinion (p. 430) the chancellor criticises *Snowden agt. Daly* (6 Sim. Rep., 524), where a contrary view appears to have been taken. In *Bronson agt. Bronson* (48 How. Prac. R., 481), cited by the defendant's counsel, the whole income was to be paid to the *cestui que trust* absolutely. And in other cases cited to support the claim of the next of kin of Ann Smith, that feature appears always more or less clearly.

I had some doubt as to the claim interposed by those interested in the residue, upon the ground that what was not otherwise disposed of by the testator fell into the residue. And there are expressions in some cases which favor such direction to their accumulations.

But I cannot resist the conclusion that as to this fund of ten thousand dollars, which had been carved out of his estate by the testator and distinctly set apart to be invested, and which after the death of his daughter was to be paid to the persons named by him, the same should carry with it to the legatees the interest or income which it had earned, and which was not expended for his daughter's maintenance.

It appears to me that this specific fund should carry its accretions in this manner acquired. I think the testator so intended, although there was no express direction for any accumulation for that purpose. *Nicholls agt. Osborn* (2 Peere Williams, 419) favors such construction (See, also, *Minot agt. Tappan*, 127 Mass., 333). In *Phelps agt. Pond* (23 N. Y., 83), SELDON, J., in commenting upon section 40, 1 Revised Statutes, 726, which treats of the disposition of rents and profits where no valid direction for an accumulation was given,

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and which the statute declares shall belong to the persons presumptively entitled to the next eventual estate, says: "The statute is founded upon the presumption that the donor of property may naturally be supposed to intend that the income should go to the same person to whom he had given that out of which the income arises." Although it does not seem to me, for the reasons above given, that the next of kin of Ann Smith have any claim to these accumulations, yet, in order to a complete determination, it may be well to bring in as a party, before judgment, the legal administrator of her estate. But if the parties desire to be further heard upon that subject an opportunity will be afforded.

N. Y. MARINE COURT.

ROBERT J. BROWN agt. WILLIAM E. GUMP *et al.*

Supplementary proceedings—Place of business—Code of Civil Procedure, section 2458.

In order to examine a non-resident of the county upon supplementary proceedings, it must appear that the defendant has within the city an office for the regular transaction of business in person, as contradistinguished from cases where he transacts the same through agents.

Special Term, September, 1880.

McADAM, J. — In order to examine a non-resident of the county upon supplementary proceedings, it must appear, in the language of the Code, that the defendant has within the city an office for the regular transaction of business in person (*Code, sec. 2458, subd. 1*). The legislature, by changing the phraseology of the old Code, evidently intended to permit the examination of a judgment debtor, outside of the county where he resided, only in cases where he has a regular place

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of business and transacts the same in person, as contradistinguished from cases where he transacts the same through agents. Effect must be given to this intent.

Order vacated.

SUPREME COURT.

THE JEROME COMPANY agt. LOEB & Co., and LEOPOLD HAAS.

E. N. WELCH MANUFACTURING COMPANY agt LOEB & Co., and
LEOPOLD HAAS.

*Injunction — under section 604 of the Code of Civil Procedure — when will
not be granted.*

Where the action was to recover damages for false representations, made by the defendants, except H., by which plaintiffs parted with a large amount of goods, and while judgment is asked against the defendants, other than H., for the amount so lost, the suit is against H. to restrain him from parting with, or disposing of, goods assigned to him, pending the action :

Held, that under a proper construction of section 604, subdivision 2, an injunction should not be granted.

At Chambers, November, 1880.

THE Jerome Company and the E. N. Welch Manufacturing Company, both Connecticut corporations, doing business in this city, brought suits in the supreme court against the firm of Loeb & Co. and Leopold Haas, to recover from Loeb & Co. for goods sold, and for damages for false representations, and to restrain the defendant Haas, pending the action, from disposing of goods belonging to Loeb & Co., removed by him from their branch house at Toronto, Canada, under power of attorney, from Loeb & Co., when the firm was financially embarrassed. The case was before judge DONOHUE in supreme court, chambers, upon a motion on behalf of defendant Haas

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to dissolve a preliminary injunction. The motion was granted, the court giving the following opinion :

Frederic B. Jennings, for plaintiffs.

Richard S. Newcombe, for defendant Haas.

DONOHUE, *J.* — This action is to recover damages for false representations made by the defendants, except Haas, by which plaintiffs parted with a large amount of goods; and while judgment is asked against the defendants, other than Haas, for the amount so lost, the suit is against Haas to restrain him from parting with or disposing of goods assigned to him pending the action. The plaintiff claims that section 604, subdivision 2, of the Code, provides that remedy. There is no doubt, in its unlimited construction, that subdivision will bear that interpretation; but taking the law as it stood, which in the Code was simply codified, the sense of the whole section, including the subdivision, is clear. There were two classes of cases provided for; first, one for the disposition of the goods, the equitable title to which was in contest, and, second, the general power of the court to restrain a judgment debtor from putting it out of the power of the court to reach his property were he not enjoined. A construction that would give the present plaintiff, before judgment, the injunction sought to be continued could be invoked in a replevin suit, and thus a plaintiff, without giving more security than \$250 on an injunction, would tie up all a defendant's property which plaintiff might claim, and make the defendants its forced custodian pending a suit. In a libel suit, or a suit for slander or assault and battery, or any suit sounding in damages, the same result would follow. It may be said that while this action sounds in damages it is really upon contract. This does not help the matter. The plaintiff must sustain the fraud or fail; and he asks to restrain the disposal of all defendant's property pending that issue. It would be useless

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to reason out the result of such a course. Any person can see what consequences would follow. I do not wish to be understood as saying that if the action had been on contract simply the same result would not be reached.

Motion granted.

SUPREME COURT.

FERDINAND MAYER agt. HENRY V. ROTHSCHILD.

Arrest — Stipulation on vacating order of, not to sue for false imprisonment.

The court, in granting a discharge from arrest when the arrest was made upon an execution issued without authority of law, has no power to impose a condition that the party thus discharged from an unlawful arrest shall not bring an action to recover his damages for such unlawful imprisonment.

The irresistible effect of such a rule would be to compel a party to surrender one right to obtain another right to which he was entitled absolutely.

At Chambers, November, 1880.

THIS is a motion by plaintiff to insert, in an order previously granted vacating an order of arrest against defendant, a clause compelling defendant to stipulate not to prosecute the plaintiff for false imprisonment.

Ex-judge Cardozo and R. S. Newcombe, for plaintiff.

Blumensteil & Hirsch, for defendant.

POTTER, J.— A motion that the order discharging plaintiffs from arrest upon an execution against his body be amended and made conditional that he stipulate not to prosecute for false imprisonment.

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The order discharging from arrest was made without notice of settlement. The question will, therefore, be considered as arising upon application to settle the order.

The ground upon which the discharge was granted was, that the defendant in this action had no right to arrest the plaintiff. The plaintiff in this action was the defendant in the action in which the arrest was made. Has the court, in granting a discharge from arrest when the arrest was made upon an execution issued without authority of law, power to impose a condition that the party thus discharged from an unlawful arrest shall not bring an action to recover his damages for such unlawful imprisonment? The irresistible effect of such a rule would be to compel a party to surrender one right to obtain another right which he was entitled to absolutely.

The court would thus, instead of meting out simple and exact justice between parties, be engaged in making contracts for parties where one of the parties is under duress and his consent is enforced. It seems to me the court should not compel parties to make a contract under circumstances which, if made by the parties themselves, the court would not enforce. Such a condition may well be imposed where the court is satisfied the arrest is without justice and upon probable cause, such as conflicting affidavits in regard to the right to arrest, and upon which a judge has exercised judicial discretion and granted an order of arrest, or some informality or defect in stating a case where the right to arrest exists (*Wilder agt. Guernsey*, unreported case in court of appeals, 19th vol. *City and Country Journal*, 401; *The N. R. Co. agt. Carpenter*, 4 Abb. *Pr. R.*, 53). But where the arrest was upon final process, and entirely without the authority of law, I think the court should not, if it has the power, impose any condition whatsoever (*Pulen agt. Harris*, 52 *N. Y.*, 77; *Wilder agt. Guernsey*, *supra*; *Bank of N. Y. agt. Tinkens*, 18 *Johns.*, 309).

Motion to resettle order by the insertion of a condition not to prosecute for false imprisonment denied.

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SUPREME COURT.

GUSTAVUS SHEPARD agt. REUBEN G. WRIGHT.

Action upon a foreign judgment—When it will lie.

The courts of this state recognize foreign judgments as binding here when the record shows that the courts rendering a judgment had jurisdiction of the subject and of the person of the defendant, and give full credit to such judgments by refusing to retry the matters when once determined in an action where the foreign courts had acquired jurisdiction.

But the judgment of the court of a sister state has no binding effect in this state, unless the court had jurisdiction of the subject-matter and of the person of the party sought to be affected thereby, and the want of jurisdiction renders the judgment a mere nullity here.

Where it appeared that the defendant was served with a copy of the bill of complaint in the action in the Canada court, at the village of Westfield, in the county of Chautauqua, in the state of New York, the place of defendant's residence, where the service was made:

Held, that such service did not give the court jurisdiction of the person of the defendant. No sovereignty can extend its powers beyond its own territorial limits to subject either person or property to its judicial decision. Every exercise of authority of this sort beyond this limit is a nullity.

A citizen of one state or country cannot be compelled to go into another state or country to litigate a civil action by means of process served in his own state or country. And a judgment obtained upon such service, where no appearance is made by the person so served, can impose no personal liability which will be recognized beyond the state in which the action originated.

It is claimed that the defendant was a citizen of Canada, although residing in the state of New York at the time of the service upon him of the bill of complaint, and that the Canada court had jurisdiction over his person wheresoever he was served:

Held, that if the fact was as is claimed, as a resident of New York, a judgment, to be enforced against him personally elsewhere than in the country where it was obtained, cannot be supported by such a service.

Special Term June, 1880.

THIS is an action brought by the plaintiff to recover upon a judgment rendered by the court of chancery for Ontario, in

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the Dominion of Canada, a court having general jurisdiction, and having jurisdiction of the subject-matter determined by the judgment.

The defendant, by his answer, denies the allegation of the complaint that he voluntarily or duly appeared in the action, and alleges that the court in Canada had no jurisdiction to render any judgment whatever against him for the reason that no bill of complaint, or process of any kind whatever, was ever served upon him within the province or Dominion of Canada; and for the further reason that he never appeared, either in person or by attorney, in the action.

By the judgment-roll received in evidence, it appears that the defendant was served with a copy of the bill of complaint in the action in the Canada court, at the village of Westfield, in the county of Chautauqua, in the state of New York, the place of defendant's residence when the service was made.

The record shows that the defendant did not appear in the action, and that the bill was taken *pro confesso* for want of an appearance.

Geo. W. Cotterill, for plaintiff.

Luther R. Marsh, for defendant.

VAN VORST, J. — The plaintiff relies exclusively upon the Canada judgment as a ground for a recovery in this action, no proof having been given of the original cause of action upon which the suit in Canada was brought. But it has been repeatedly adjudicated that the judgment of the court of a sister state even has no binding effect in this state, unless the court had jurisdiction of the subject-matter and of the person of the party sought to be affected thereby, and that the want of jurisdiction renders the judgment a mere nullity here (*Kerr agt. Kerr*, 41 N. Y., 272, 275).

In *Starbuck agt. Murray* (5 Wend., 148, 158) MARCY, J., says: "If the defendant had not proper notice of, and did

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not appear to the original action, all the state courts, with one exception, agree in the opinion that the paper introduced as to him is no record" (*Shumway* agt. *Stillman*, 4 *Cowen*, 272; *Borden* agt. *Fitch*, 15 *Johns.*, 121; *Noyes* agt. *Butler*, 6 *Barb.*, 613; *Bradshaw* agt. *Heath*, 13 *Wend.*, 407).

And the record itself, if it contained an untrue statement with regard to the service of process upon the defendant, or as to his appearance, can be contradicted when offered in evidence. The record is not conclusive as to a recital of jurisdictional facts, and the defendant is at liberty to show want of jurisdiction although the record avers the contrary (*Noyes* agt. *Butler*, *supra*; *Gilman* agt. *Gilman*, 126 *Mass. R.*, 646).

But the learned counsel for the plaintiff urges that the service upon the defendant, at Chautauqua county, of a copy of the bill of complaint, under the laws of Canada, gave the court jurisdiction of the person of the defendant. I cannot agree with him in such contention.

No sovereignty can extend its powers beyond its own territorial limits to subject either person or property to its judicial decision. Every exercise of authority of this sort, beyond this limit is a nullity (*Story on Conflict of the Laws*, sec. 539).

The jurisdiction of state courts is limited by state lines (*Ever* agt. *Coffin*, 1 *Cushing R.*, 23).

This last case states that "upon principle it is difficult to see how an order of a court, served upon a party out of the state in which it is issued, can have any greater effect than knowledge brought home to the party in any other way."

A citizen of one state or country cannot be compelled to go into another state or country to litigate a civil action by means of process served in his own state or country. And a judgment obtained upon such service, where no appearance is made by the person so served, can impose no personal liability which will be recognized beyond the state in which the action originated (*Freeman on Judgments*, secs. 564, 567).

In *Holmes* agt. *Holmes* (4 *Lans.*, 392), it is held that in

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order that the court have jurisdiction of the person of the defendant, it is necessary that the defendant be served with the process of the court, or voluntarily appear in the action, and "that such service of process can only be made within the territorial jurisdiction of the court" (*Dunn* agt. *Dunn*, 4 *Paige*, 425; *Ex parte Green* agt. *Onondaga Com. Pleas*, 10 *Wend.*, 592; *Folger* agt. *Columbia Ins. Co.*, 99 *Mass.*, 267).

The plaintiff claims, however, that the defendant was a citizen of Canada, although residing in the state of New York at the time of the service upon him of the bill of complaint, and that the Canada court had jurisdiction over his person, wheresoever he was served. There is no evidence that he was other than a citizen of the country of his residence. But if the fact was as it is claimed, as a resident of New York, a judgment to be enforced against him personally elsewhere than in the country where it was obtained, cannot be supported by such a service (*Story's Conflict of the Laws*, sec., 640).

I have carefully considered all the authorities cited by the learned counsel for the plaintiff, and cannot find that they announce a doctrine or practice in opposition to that above stated.

The comity due to the courts of other countries is urged as a ground for a recovery here upon this judgment.

The courts of this state do recognize foreign judgments as binding here, when the record shows that the courts rendering a judgment had jurisdiction of the subject and of the person of the defendant, and give full credit to such judgments by refusing to retry the matters when once determined in an action where the foreign courts had acquired such jurisdiction.

We go no further with respect to judgments of a sister state.

I do not think that the plaintiff has established a cause of action against the defendant, and the complaint should be dismissed with costs.

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CONTAINING THE WHOLE OF

**59 HOW., ANTE, AND QUESTIONS OF PRACTICE CONTAINED
IN 20 HUN, AND 77 AND 78 N. Y. REPORTS.**

Attention is called to the two additional headings "CODE OF PROCEDURE" and "CODE OF CIVIL PROCEDURE," under which (for the convenience of the reader) will be found collated decisions bearing upon the various provisions of both Codes.

ABATEMENT AND REVIVAL.

1. Under the provision of section 19 of the general insurance act of 1849 (*chap. 808, sec. 19, Laws of 1849*), making the "corporators" of a stock company organized under the act "jointly and severally liable until the whole amount of the capital raised by the company shall have been paid in and a certificate thereof recorded," where a corporator is liable the cause of action survives upon his death. (*Chase agt. Lord, 77 N. Y., 1.*)
2. The provision of the Code of Civil Procedure (*sec. 758*), providing that the estate of one jointly liable with others shall not be discharged by his death, does not affect contracts entered into before its passage. The provision is not merely remedial, as it imposes, in some cases, an obligation where none existed before. (*Randall agt. Sackett, 77 N. Y., 480.*)
3. Where, therefore, after action brought against two sureties upon a joint undertaking given upon appeal prior to the passage of said Code, one of the defendants died, *held*, that his liability ceased upon his death; and that a motion to revive the action against his exe-

cutors, and to substitute them as defendants, made after said Code went into effect, was properly denied. (*Id.*)

ACTION BY THE STATE.

See COUNTER-CLAIM.

The People agt. Denison, ante, 157.

ACCOMMODATION INDORSER.

1. If an accommodation maker or indorser has no interest in the way in which the proceeds of the note are to be used, it is no defense to him that he was told the note was to be discounted by a bank, though it was in fact used and intended to be used in paying an antecedent debt. (*Wheeler agt. Allen, ante, 118.*)

ACCOUNTING.

See TENANTS IN COMMON.

Wright agt. Wright, ante, 176.

ACTION.

1. In an action brought to prevent an interference by the defendant

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with the plaintiffs' alleged right to use a road or way across the premises of the defendant, and to compel the defendant to remove obstructions placed by him upon said way to prevent its use by the plaintiffs :

Held, that, as plaintiffs' damages by reason of being deprived of the use of the way would be difficult of estimation in dollars and cents, and as the claimed right to its use by the one party and its denial by the other will be productive of many actions, unless settled by this suit, upon these two well-understood grounds of equitable relief, as well as that of the affirmative relief sought, that the defendant be compelled to remove a cause of continuing injury, the action is maintainable, provided the plaintiffs are entitled to use the road as they insist that they are. (*Longendyke* agt. *Anderson*, ante, 1.)

ADMISSIONS AND DECLARATIONS.

1. Upon the trial of an action for an assault and battery a witness was allowed, against the defendant's objection and exception, to testify that the defendant, upon a former trial of the action, in opening the case to the jury in his own behalf, stated, in reference to the affray, that he knew he had made himself liable.

Held, no error. (*Kiff* agt. *Youmans*, 20 *Hun*, 123.)

2. Having established a conspiracy, proof of the acts, admissions and declarations of any one of the conspirators in pursuance and furtherance of the criminal enterprise, and in reference thereto, is competent. But the statement of one of them as to a past transaction accompanying no act done in furtherance of, or in connection with such enterprise, is not competent against the others. (*N. Y. Guar. and Ind. Co.* agt. *Gleason*, 78 *N. Y.*, 504.)

3. Accordingly *held*, error; where the wife of one of the alleged conspirators was allowed to testify to statements made to her by him as to acts done by the parties implicated. (*Id.*)

4. Statements of a defendant, pertinent to the issues, are competent evidence against him of the facts stated; but such statements are not competent to discredit the statements of a witness for the defendants. (*Id.*)

ADVICE OF COUNSEL.

1. When, in an action for malicious prosecution, defendant may show the advice given to him by his attorney. (*Turner* agt. *Dinnegar*, 20 *Hun*, 465.)

AFFIDAVITS.

1. Upon disputed facts, and especially such an one as the existence of an agreement as to the mode of use of a party wall for all time, the only evidence thereof being acts of parties, the court will not decide on *ex parte* affidavits. (*St. John* agt. *Sweeney*, ante, 175.)
2. To justify an order to examine a defendant to enable a plaintiff to frame his pleading, the affidavit must make disclosure of what induced plaintiff to proceed; and the framing of a general averment is not sufficient. (*Simmons* agt. *Vanderbilt*, ante, 411.)

See ARREST.

Netzel agt. *Mulford*, ante, 452.

3. Where, in an affidavit upon which an order of arrest is granted, the facts are stated positively, not on information and belief, are not denied or disputed by defendant when opportunity is afforded, and the facts alleged are not such that the affiant could not by any possibility have sufficient knowl-

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edge of to verify, an appellate court, sitting in review of the order, may take the facts as stated. (*Pierson* agt. *Freeman*, 77 N. Y., 589.)

4. Where facts are thus positively affirmed, the affiant is not required to state the source of his knowledge or his means of information; this is necessary only where the facts are stated on information and belief. (*Id.*)

AGREEMENT.

1. Defendant being indebted to plaintiffs in the sum of \$956.28, one A. conveyed to the plaintiffs a plot of ground "as collateral security for said indebtedness." On the day of the conveyance the plaintiffs signed a written memorandum which recited: "Whereas, George W. Fletcher is indebted to us in the sum of \$956.28, and is at present unable to pay the same; and, whereas, we have agreed to give Fletcher time to pay the same, not exceeding thirty-eight months from the date thereof, and that we will accept monthly payments of not less than twenty-five dollars a month to be paid on the first of each and every month until the whole amount be paid, with interest thereon from July 1, 1876;" and, also, the giving of the deed by A. as collateral security for the indebtedness as before mentioned, and then obligated the plaintiffs to reconvey the property conveyed, when the debt due from Fletcher was "paid in accordance to the terms of the above agreement:"

Held, that no part of the debt became due before the expiration of thirty-eight months. (*Howell* agt. *Fletcher*, ante, 88.)

2. A promise on the one side to accept, and on the other to pay, a given sum in composition of a debt in installments, is a single agreement to pay a specified sum

in installments, and upon a failure to make one payment the whole contract is broken by the debtor, and the creditor can again enforce the original debt. (*Id.*)

3. But where, as in this case, time is given for the whole debt, and there is no promise to pay in installments, but only a declaration by the plaintiffs that they will accept monthly payments if the defendant sees fit to make them, until the defendant fails to pay according to the terms of the agreement, the plaintiffs have no cause of action which they can enforce. (*Id.*)

ALIMONY.

1. Alimony and counsel fee will be granted to the wife in an action against her husband for divorce to annul the marriage on the ground of his physical incapacity. (*Allen* agt. *Allen*, ante, 27.)

2. The case of *Bartlett* agt. *Bartlett* (*Clark's Ohy. Reps.*, p. 460) not followed. (*Id.*)

3. In an action brought by a wife to have the marriage annulled for the alleged impotency of the husband, the court is not authorized to make an order against the husband for alimony to the wife, *pendente lite*, or to provide funds to defray the expenses of the suit. This is adverse to *Allen* agt. *Allen* (ante, p. 27). (*Bloodgood* agt. *Bloodgood*, ante, 42.)

4. The provisions of the Revised Statutes as to requiring the husband to pay sums necessary to carry on the suit during its pendency, are restricted to cases where the wife admits the existence of a valid marriage and seeks a divorce or separation for subsequent misconduct of the husband. (*Id.*)

5. Where the husband is plaintiff and seeks to annul the marriage,

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but the wife affirms its validity, she is entitled to alimony and counsel fees. (*Id.*)

6. Where the husband has stipulated to pay half the referee's fees, such stipulation will be enforced. (*Id.*)

7. Where a decree of divorce has been obtained by a wife against her husband and an allowance of alimony has been made for her support and "for the support and maintenance" of her three children:

Held, that the legislature intended that the allowance to the wife should be unchanged, but that the provision for the support of the children might be altered as their circumstances changed. (*Kerr* agt. *Kerr*, ante, 255.)

AMENDED PLEADINGS.

1. Where, after issue has been joined in an action, and the same has been regularly noticed for trial at a circuit, by the defendant, the plaintiff in good faith and within the time allowed by law serves an amended complaint, the issue theretofore joined and noticed for trial is destroyed, and the action cannot be tried until new issues have been joined and regularly noticed for trial. (*Ostrander* agt. *Conkey*, 20 *Hun*, 421.)

2. When the amended pleading is served in bad faith, the remedy of the party aggrieved is by motion to strike it out. (*Id.*)

AMENDMENT.

1. A referee has the same power to allow amendments to any pleading as the court, upon such trial, upon the same terms and with like effect, and the matter being properly at his disposal, his action will not be reviewed by a judge at chambers. (*Oregon Steamship Company* agt. *Otis*, ante, 254.)

2. The power to amend the process given by sections 948 and 954 of the United States Revised Statutes is power to amend a want of form in process, but does not apply to a summons in this form. There must first be a process to be amended; and a summons issued in this manner is no process. (*Dwight* agt. *Merritt*, ante, 820.)

See JUSTICES' COURT.

Snyder agt. *Schram*, ante, 404.

3. Action in justice's court—what amendments not allowed after issue joined, and in the absence of the defendant. (*See Gilmore* agt. *Barnett*, 20 *Hun*, 514.)

4. Undertaking given on procuring order of arrest—power of court to allow an amendment of defects therein. (*See Irwin* agt. *Judd*, 20 *Hun*, 562.)

5. Of answer on trial, when proper. (*See K. L. Ins. Co.* agt. *Nelson*, 78 *N. Y.*, 137.)

6. Of complaint, after judgment and satisfaction, by adding new cause of action, is in the discretion of the court. (*See Hatch* agt. *Cent. Nat. Bank*, 78 *N. Y.*, 487.)

ANSWER.

1. Denial of allegations in the complaint may be made upon information and belief. (*Brotherton* agt. *Downey*, ante, 206.)

2. A party has no right to interpose an unqualified denial in a verification unless it be founded upon personal knowledge, and where he has not personal knowledge, but has knowledge or information sufficient to form a belief, he is not only permitted but bound, at his peril, to deny upon information and belief. (*Id.*)

3. Where the answer denies having any knowledge or information

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sufficient to form a belief as to any or all the allegations in the complaint contained and, therefore, denies the same, except as hereinafter specifically admitted, the facts which were specifically admitted having been demurred to, on motion for judgment on this general denial:

Held, that the denial in the answer is good. The form of pleading is one well known to the profession and has been sanctioned for years. (*Smith* agt. *Gratz et al.*, *ante*, 274.)

4. *McEnroe* agt. *Decker* (58 *How.*, 251), *not followed*; *see Allis* agt. *Leonard* (46 *N. Y.*, 688). (*Id.*)

5. In a suit for limited divorce on the ground of cruelty, where the defendant was ordered to pay alimony, upon which he left the state, and upon the return of precept unsatisfied an order *nisi* was made that he pay within five days or that his answer be struck out:

Held, that, on proof of default, the court had power to make an order striking out the defendant's answer, which contained a general denial, and to direct a reference to take proof as if no answer had been served. (*Walker* agt. *Walker*, *ante*, 476.)

APPEAL.

1. An order setting aside and vacating an attachment is not reviewable in the court of appeals. (*Olaflin et al.* agt. *Baere*, *ante*, 20.)
2. A stay of proceedings will be granted to enable a party to review an order denying an application to make a pleading more definite and certain. (*Brinkerhoff* agt. *Perry*, *ante*, 155.)
3. Where, in respect to the original pleading, the general term entertained an appeal from an order of special term denying an application to compel plaintiff to amend

by making more definite and certain, and ordered that the complaint be so amended:

Held, the presumption is that such appeal was properly entertained and that the general term will entertain a second appeal in the same case. (*Id.*)

4. The court of appeals have no jurisdiction to review an order vacating an order of arrest or commitment where it appears from the order that the same was made "upon due consideration of the proofs in the matter and the affidavits upon which the warrant was granted." (*In re Nebenzahl*, *ante*, 192.)
5. The court of appeals will not look into the opinions to find matter there differing from that in the order, unless the language of the order is ambiguous and needs aid for an understanding upon which it went (*See S. C.*, 57 *How.*, 328). (*Id.*)
6. There can be no appeal from an order of the marine court granting a new trial without the stipulation required by the act of 1874. Nor have the provisions of chapter 479 of the Laws of 1875 abrogated or repealed the provisions of the act of 1874. (*People ex rel. Salke* agt. *Talcott*, *ante*, 269.)
7. The absence of the stipulation and the appeal from the order assuming the appeal was regular under the act of 1875, took the case out of the provisions of the act of 1874 and left the court of common pleas to the exercise of the discretion vested in that court in such cases by subdivision 2 of section 48 of chapter 479 of the Laws of 1875, and the exercise of that discretion is not reviewable at a special term of this court on the extraordinary writ of prohibition. (*Id.*)
8. The relator, if aggrieved by the judgment of the court of common

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- pleas because of any irregularity of form, has a plain remedy by application to that tribunal for the correction of the judgment, this court should not interfere by prohibition while so simple and easy a remedy lies open to the relator. (*Id.*)
9. As there was no lawful appeal which could give the court of common pleas jurisdiction under the statute, the case has remained in legal contemplation in the marine court, subject to the order of the general term granting a new trial, and this court will not interfere with the functions of that tribunal in this case by a writ of prohibition. (*Id.*)
 10. A reference to assess damages upon injunction should not be granted, after appeal from the judgment is perfected, until final decision upon the appeal. (*Howard et al. agt. Park et al., ante, 344.*)
 11. Where judgment absolute was rendered against a defendant in accordance with his stipulation, given on appeal from an order granting to plaintiff a new trial, and a reference was ordered to ascertain the amount due to the plaintiff, the referee reporting that nothing was due to the plaintiff, but that there was a sum due to the defendant on his counterclaim:
Held, that the defendant's right to affirmative relief was lost by the judgment rendered on his stipulation, and that he could not enter judgment for the amount found due him (*See The People agt. Denison, ante, 157.*) (*Rust agt. Hauselt, ante, 389.*)
 12. Reversal of judgment on—effect of, on the arrest of a defendant under an order of arrest and also under an execution issued on the judgment. (*See People ex rel. Roberts agt. Bowe, 20 Hun, 85.*)
 13. The judgment of commissioners in deciding upon the amount of damages to be allowed under section 18, chapter 140 of 1850, cannot be reviewed—only legal errors are reviewable on an appeal therefrom. (*See Matter of P. P. and C. I. R. R. Co., 20 Hun, 184.*)
 14. Who entitled to costs on partial affirmance of judgment in justice's court by county court—Code, section 371. (*See Chapin agt. Skeels, 20 Hun, 448.*)
 15. From the determination of commissioners of highways—fees of referees, when a county charge—section 9 of chapter 455 of 1847. (*See People ex rel. Scott agt. Supervisors, 20 Hun, 196.*)
 16. An order denying a motion for leave to serve an amended complaint is not appealable to this court. (*Quimby agt. Clafin, 77 N. Y., 270.*)
 17. Where, upon appeal from an order allowing to plaintiff costs in an action against executors, upon a claim against the estate, the question as to whether there was an offer to refer appears to have been one of fact, although this court has power to pass upon the question as an original one, the general rule acted upon by it is to adopt the finding of the court below. (*Field agt. Field, 77 N. Y., 204.*)
 18. After the appointment of a receiver in proceedings by the attorney-general against an insolvent life insurance company, by order of the court liberty was given to certain policy-holders to appear by attorney in all motions and proceedings therein, and it was provided that notices of all motions and proceedings in court on the part of the attorney-general, or of the receiver, be served upon the attorneys of said policy-holders. An actuary was appointed, who

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made his report; a copy thereof with notice of hearing thereon was served upon said attorneys. Upon the hearing said attorneys appeared and interposed certain objections and exceptions to the report: the report was confirmed; the policy-holders, represented by said attorneys, appealed to the general term from the order of confirmation, where the appeal was dismissed on the ground that they were not parties to the proceedings, and had no right to appeal, *held*, error; that they were made parties by the notice and appearance, and were parties aggrieved within the meaning of section 1294 of the Code of Civil Procedure. (*In re Atty.-Gen. agt. N. Am. Ins. Co.*, 77 N. Y., 297.)

19. Where, in an action for divorce on the ground of adultery, trial is had before a referee, and judgment rendered upon his report in favor of defendant, which is reversed by the general term on questions of fact and a new trial ordered, the order of general term is appealable to this court, the appellant giving the usual stipulation required by the Code of Civil Procedure (*sec. 191.*) (*Conger agt. Conger*, 77 N. Y., 432.)

20. In such case, upon affirmance of the order here, judgment absolute can be rendered against the appellant upon such stipulation, as the question of adultery has been tried, and the decision of the general term and of this court is to the effect that the defendant is guilty; the judgment therefore will be based upon evidence and upon judicial determinations. (*Id.*)

21. As to whether the order is appealable, where the judgment was reversed for error of law, not involving the merits, *quære*. (*Id.*)

22. To a complaint setting forth several orders of the surrogate of the county of New York, defendant demurred, upon the ground that

the complaint omitted to allege the facts necessary to give the surrogate jurisdiction; the demurrer was overruled and judgment rendered for plaintiff, which was affirmed by the general term. On appeal to this court, defendant asked leave, in case the judgment should be affirmed, to withdraw the demurrer and put in an answer on terms:

Held, that the application should, under the circumstances of the case, be made to the court below; judgment therefore affirmed, with leave to make such application. (*Bearns agt. Gould*, 77 N. Y., 456.)

23. An exception, as to language used in a charge, to be available, must present it in the same, or in equivalent words embracing the substance of the charge, and presenting so clearly and distinctly the proposition enunciated by the court that there can be no doubt as to what was actually intended. (*McGinley agt. U. S. L. Ins. Co.*, 77 N. Y., 495.)

24. Where the phraseology of the exception is of doubtful construction so that it is not easy to determine what is meant, or to say that it applies to any distinct portion of the charge as made, it furnishes no ground for reversal of the judgment. (*Id.*)

25. The determination of the supreme court upon a question of vacating a judgment for a mere irregularity, based upon a rule of practice, not a positive statute, and where the party complaining has not been in any way prejudiced, is not reviewable in this court. (*Moore agt. Shaw*, 77 N. Y., 512.)

26. Accordingly *held*, that an order denying a motion to vacate a judgment for deficiency in a foreclosure suit, on the ground that the report of the referee who made the sale was not confirmed, and

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- no application for a personal judgment against defendant made, was not reviewable here. (*Id.*)
27. An order vacating and setting aside an *ex parte* order discharging an assignee for the benefit of creditors, and his sureties, from all liability to the creditors, and canceling his bond, is in the discretion of the court, and is not reviewable here. (*In re Horrefalls*, 77 N. Y., 514.)
28. Such an order also is not appealable, because it is not a final order within the provision of the Code of Civil Procedure (*sub. 3, sec. 190*), regulating appeals to this court. (*Id.*)
29. The question whether the moving creditor has such an interest as authorized him to make the motion cannot be reviewed on appeal from such an order. (*Id.*)
30. Before an action of trespass can be said to affect the title to real estate, within the meaning of the provision of the Code of Procedure (*sec. 11, as amended by chapter 322, Laws of 1874*), limiting appeals to this court, the issues, trial and judgment must be such as to determine or establish the title in favor of one party or the other. (*Scully agt. Sanders*, 77 N. Y., 598.)
31. It is within the discretion of the supreme court to grant or withhold a common-law *certiorari*, and its discretion cannot be reviewed. (*People ex rel. Hudson agt. Fire Commissioners*, 77 N. Y., 605.)
32. An unreasonable delay in applying for the writ may be a ground for refusing it, and for quashing it even after a hearing on the return thereto. (*Id.*)
33. Plea of former suit pending in action upon undertaking given on, when not sustained. (*See Porter agt. Kingsbury*, 77 N. Y., 164.)
34. Order made by special term for examination of defendant to enable plaintiff to make complaint, reviewable here. (*See Heishon agt. Knick. L. Ins. Co.*, 77 N. Y., 278.)
35. An order setting aside an *ex parte* order vacating a levy under an attachment, is discretionary and so not appealable. (*See Ellis agt. Rice* [Mem.], 77 N. Y., 610.)
36. When no material evidence given under offer of evidence on criminal trial, exception not available. (*See Morris agt. People* [Mem.], 77 N. Y., 622.)
37. Although the granting or refusal of a writ of mandamus is regarded as discretionary, as distinguished from a writ of right, it is not an absolute or arbitrary discretion, but is to be exercised under, and may be regulated and controlled by legal rules; and the exercise of the discretion is reviewable here. (*Peo. ex rel. Gas Light Co. agt. Com. Council of Syracuse*, 78 N. Y., 56.)
38. Where the writ is refused, and it appears that there is a clear legal right, and that there is no other adequate remedy, the order or judgment may be reversed. (*Id.*)
39. There is no distinction between legal and equitable actions, or between actions tried by a jury or a court, in respect to the availability of exceptions taken upon the trial upon admission of incompetent evidence; in any case an error in receiving such evidence, if properly excepted to, can only be disregarded when it can be seen that it could do no harm. (*Foots agt. Beecher*, 78 N. Y., 155.)
40. An order of the general term granting a new trial, in a case tried by a jury, where the facts were before the general term, and it had the power to grant a new trial thereon, is not appeal-

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- able. (*Snobley* agt. *Conner*, 78 N. Y., 218.)
41. The opinion of the general term cannot be looked to for the reason or grounds of its decision. (*Id.*)
42. Upon appeal from such an order, *held*, that as the practice in such cases had become thoroughly established and known, the order should be affirmed in accordance with the stipulation in the notice of appeal, instead of the appeal being dismissed. (*Id.*)
43. A trustee of a fund for the security of an indebtedness to others, who as such is plaintiff in an action to enforce such indebtedness, may appeal from a judgment which reduces and limits the number of those who are creditors upon the fund; he is aggrieved by the judgment when a real claim is not added into the amount adjudged to be due, and a real claimant is shut out by it from a share in the proceeds. (*Bockes* agt. *Hathorn*, 78 N. Y., 222.)
44. *It seems*, that where there is a pressing need to enforce a lien for the benefit of the trust, one of several trustees, as sole plaintiff, may bring an action for that purpose, when his associates will not join; in which case they may be made defendants. (*New Code*, sec. 448). (*Id.*)
45. Where an action is so brought, the plaintiff may appeal from the judgment without the consent of his co-trustees. The responsibility of his position as plaintiff having been put upon him by the refusal of his associates to act, it is with him to take such action in the suit as his judgment dictates. (*Id.*)
46. The plaintiff in such an action may, and it is his duty in a proper case, to permit his name to be used by a *cestui que trust*, for the review of a judgment fatally adverse to the latter; and the court may by order permit such an appeal to be brought. (*Id.*)
47. The fact that the *cestui que trust* is a party to the action, and has or may take an appeal in his own name, does not take away the power in the trustee or the court; it is for the consideration of the trustee and the court in the exercise of their discretion. (*Id.*)
48. The notice of entry of judgment required to be served (*new Code*, sec. 1851), in order to limit the time of appeal from a judgment entered upon the report of a referee, must be one coming from the prevailing party; no other party, nor the attorney representing another party, has the right to serve a notice for the prevailing party; and a notice so served will not, so far as he is concerned, set running the bar of the statute. (*Kilmer* agt. *Hathorn*, 78 N. Y., 228.)
49. Two of three trustees brought an action, among other things, to determine the validity of claims upon the trust fund, in which action B., a co-trustee, was made a party defendant. Judgment was entered upon the report of a referee against certain of the defendants; B. was only affected thereby as trustee. Notice of judgment was served by plaintiff's attorney on defendants; no notice thereof was served on behalf of B. Within thirty days after such service notice of appeal, on the part of one of the defendants against whom the judgment was rendered, was served upon plaintiff's attorney; none was served upon B. Upon plaintiff's motion the appeal was dismissed:
Held, error; that service of notice of appeal upon B. was not required; and that the notice of appeal was good as to the prevailing party, who served notice of judgment. (*Id.*)
50. Also, *held*, that the notice of

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judgment was insufficient to limit the time to appeal, as the office address or place of business of the attorney was not stated as required by the rules. (*Supreme Court Rule 2*). (*Id.*)

51. Where a surrogate, in his decree upon the final accounting of an executor, directed the payment by him to his counsel of a sum stated:

Held, that the question as to the jurisdiction of the surrogate to make the order, could be raised by motion before the surrogate to set aside that portion of the decree; and that an appeal lay from an order denying such motion. (*Seaman* agt. *Whitehead*, 78 N. Y., 306.)

52. A court of equity may, in its discretion, set aside a sale made under its decree, and may order a re-sale, where fraud is alleged, upon facts casting such a degree of suspicion upon the fairness of the sale as to render it, in its judgment, expedient so to do, although the alleged fraud may not be clearly established. (*Fisher* agt. *Hersey*, 78 N. Y., 887.)

53. An order of special term, setting aside a sale under such circumstances is reviewable at general term, but, as a general rule, where only the rights of the parties to the action are involved, no appeal lies to this court. (*Id.*)

54. Q. having been appointed receiver of an insolvent savings bank executed his bond with O'D. as surety. Q. entered upon his duties, but subsequently by leave of the court resigned, and a new receiver was appointed. An order of special term was made settling the accounts of Q., as receiver, which contained a clause authorizing O'D. to appeal on stipulating to be bound by the decision thereon. O'D. appealed to the general term, making the required stipulation, which was accepted by the opposite party. The ap-

peal was heard without objection to the right of O'D. to appeal; the order appealed from was affirmed, with a direction that O'D. pay to the new receiver the amount of the bond.

Held, that O'D. was entitled to appeal to this court. (*In re Rec'ship of Guardian Savings Inst.*, 78 N. Y., 408.)

55. The determination of questions, relating solely to matters of practice in the disposition by the court below of causes on its own calendar, will not be interfered with by this court. (*Kellum* agt. *Durfoo*, 78 N. Y., 484.)

56. A cause was moved for trial at circuit; by direction of the court it was placed on the special term calendar. The special term ordered additional parties to be brought in as parties defendant. On appeal from such order the general term reversed it and directed the cause to be placed on the circuit calendar for trial:

Held, that the general term order was not appealable; that any question as to the mode of trial, or as to parties, could and should be raised upon trial, and an exception taken, to be heard on appeal from judgment. (*Id.*)

57. After the satisfaction of a judgment in favor of plaintiff, it is within the discretion of the court to vacate it and to amend the complaint by adding new causes of action, although by so doing the statute of limitations is avoided. (*Hatch* agt. *Centl. Nat. Bk.*, 78 N. Y., 487.)

58. An order, therefore, granting such relief is not reviewable here. (*Id.*)

59. Plaintiff was nonsuited; on appeal a new trial was granted, costs to abide event. On the second trial defendant had a verdict, and the clerk taxed costs of appeal in his favor. On appeal from order

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of general term, affirming an order of special, directing a re-taxation and disallowing costs of appeal:

Held, as the appeal was from the construction by a general term of its own order, which was in accordance with the construction of other similar orders, such interpretation would not be interfered with by this court. (*Un. Tr. Co. agt. Whiton*, 78 N. Y., 491.)

60. Where costs were denied by the court below, on the sole ground of want of power to grant them, the court recognizing the right of the applicant to such costs, on appeal to this court, it being determined that the court below had the power;

Held, that the order be reversed and application granted. (*Marvin agt. Marvin*, 78 N. Y., 541.)

61. Defendants' attorney having served an offer of judgment signed by defendants' attorney to which no affidavit showing his authority to make it is annexed, as required by the Code of Civil Procedure (*sec.* 740), and plaintiff on the trial having recovered less than the amount named, said attorney moved to be allowed to serve the affidavit *nunc pro tunc*, and for an extra allowance. The motion was denied:

Held, that if such an amendment was authorized, it was in the discretion of the court, and an order denying the application therefor, was not reviewable here; and that as the question of costs could not arise until this relief was obtained, the decision of the motion did not determine the right to costs, and so was not appealable on that account. (*Riggs agt. Waydell*, 78 N. Y., 586.)

62. Where a receiver has been appointed in proceedings supplementary to execution instituted in favor of one judgment creditor, in an action brought by another judgment creditor, to set aside

such proceedings on the ground of collusion, it is in the discretion of the court to appoint another receiver, and to direct the first receiver to hand over to him the property received. (*Connolly agt. Krets*, 78 N. Y., 620.)

63. An order therefore, making such appointment and giving such direction, is not reviewable here. (*Id.*)

64. Where the affidavits upon which an attachment was granted, and those used in opposing a motion to vacate the same, show a state of facts authorizing the granting of the attachment upon the ground stated, an order denying the motion is not reviewable here. (*Whittaker agt. Imp. Skirt Mfg. Co.*, 78 N. Y., 621.)

65. From a surrogate's decree made in 1867, on the accounting of an administrator, the latter appealed; the petition of appeal specified certain portions of the decree as erroneous. The general term made an order in February, 1871, which the contestant claimed reversed the whole decree. The latter made a motion at general term, in June, 1878: 1st. For leave to renew a former motion. 2d. To amend or modify the general term order. This motion was denied:

Held, that the order was not reviewable here; that if the order of 1871 was erroneous and reviewable an appeal should have been taken therefrom; if irregular, the attention of the court should sooner have been called to it; but, in any view, it was a matter within the discretion of the supreme court. (*Bentley agt. Waterman*, 78 N. Y., 623.)

66. From decision of commissioners of highways, requisites of notice, and what questions can be raised on. (*See Rector agt. Clark*, 78 N. Y., 21.)

67. When notice of appeal should

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be served on defendant who has not answered. (*See Argall* agt. *Pitts*, 78 N. Y., 239.)

68. Order granting attachment, when reviewable here. (*See S. C. Bank* agt. *Alberger*, 78 N. Y., 253.)

69. When order striking out incompetent evidence received without objection, not reviewable here. (*See Miller* agt. *Montgomery*, 78 N. Y., 282.)

70. Where judgment on report of referee was reversed by general term on questions of law and fact, the court disagreed with the general term as to law, and were equally divided upon the facts (one of the judges not sitting), ordered that appellant have leave to withdraw appeal. (*See Parsons* agt. *Brown* [Mem.], 78 N. Y., 618.)

71. In action of trespass upon lands defendant claimed to be in possession under a parol contract for the purchase, the referee found that defendant was in lawful possession:

Held, that an exception to evidence on the part of defendant, incompetent under section 899 of the Code, as to the parol contract (the vendor having died), was not ground for reversal, as the evidence was entirely immaterial and could not have injured. (*See Fanner* agt. *Johnson* [Mem.], 78 N. Y., 617.)

72. When order as to disposition of funds in hands of receiver appointed in a foreclosure suit, is in discretion of court and not reviewable here. (*See Embury* agt. *Foster* [Mem.], 78 N. Y., 624.)

APPEARANCE.

1. The general appearance and answer of a defendant corporation ought to be deemed an admission of its corporate existence; and it ought not afterwards, when no

special issue is presented, insist that plaintiff must produce and prove its character; at all events, in such case it is enough to show user or corporate acts to make a *prima facie* case of the entity and identity of such corporation. (*Derrenbacker* agt. *Lehigh Valley Railroad Company*, ante, 283.)

2. A corporation, like a natural person, may appear voluntarily by attorney; and such appearance gives jurisdiction to the same extent as if there was actual service of process. (*In re Atty.-Gen.* agt. *Guard. Mut. L. Ins. Co.*, 77 N. Y., 272.)

ARREST.

1. Subdivision 4 of section 550 of the Code of Civil Procedure, was intended and is a substitute for the writ of *ne exeat*. (*Boucicault* agt. *Boucicault*, ante, 131.)

2. Where, in a suit by the wife against her husband, for a divorce, the plaintiff shows that the defendant is about to depart from the state, with no present intention of returning, except, possibly, to pass through it, and that he is to sail for Europe within a month, to be gone indefinitely:

Held, that a case is made out in which an order of arrest may lawfully issue. As the judgment may require the performance of an act, the neglect or refusal to perform which would be punishable by the court as a contempt, the case is brought within subdivision 4 of section 550 of the Code of Civil Procedure. (*Id.*)

3. Under section 770 of the Code of Civil Procedure, in the first judicial district, a motion, which elsewhere must be made in court, may be made to a judge out of court, except for a new trial upon the merits. (*Id.*)

4. An application for an order of arrest may be lawfully made to,

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and properly granted by, a justice out of court in the first judicial district. (*Id.*)

5. Any application which elsewhere may be made in court, may here be made at any time to a judge out of court. (*Id.*)

6. An order of arrest is not irregular which prescribes the form of undertaking as directed in subdivision 1 of section 575 of the Code of Civil Procedure. (*Id.*)

7. A defendant's right to the jail liberties under section 149, is not in the least affected by such direction. If the defendant does not desire to give the bail required by the order to effect his discharge, he has a perfect right to offer the limit bond under section 149, and the sheriff would be bound to accept it. (*Id.*)

See APPEAL.

In re Nebenzahl, ante, 192.

8. In an action to recover damages for a sum of money embezzled by defendant while acting in a fiduciary capacity as agent of plaintiff, where defendant collected such money and after appropriating it to his own use gave secured notes to plaintiff for the amount embezzled, representing that the notes were well secured when they were not:

Held, that because of the false statements made by defendant in inducing plaintiff to take the notes plaintiff could repudiate the settlement for fraud. (*Spence agt. Baldwin, ante, 375.*)

9. And where, on a motion by defendant to vacate the order of arrest granted in the action, the point is raised that no tender or surrender of the notes received in settlement was made before the commencement of the action:

Held, that the notes must be surrendered, and such surrender must be a condition of upholding the order of arrest. The notes must

be filed with the clerk to await the final order of the court. If this is complied with the motion to vacate the order of arrest will be denied. (*Id.*)

10. Where the defendant was held on an order of arrest, a motion having been made upon affidavits to vacate the order of arrest, a reference was ordered, and pending the reference the action was tried and judgment was rendered for the amount of the debts and costs, the judge declining to hear evidence on the question of fraud. An execution having been issued against the person of defendant, a motion was made to set it aside:

Held, that the application was made in this case before judgment, and in season. The judgment only determined the fact and amount of the defendant's indebtedness, and not necessarily what kind of execution may be issued to enforce it. The question whether the execution could be issued against the body could only be determined in this action by the existence of the order of arrest after the defendant had lost the right to move to vacate such order. (*Kohn agt. Burnett, ante, 410.*)

11. Under section 2487 of the Code of Civil Procedure, it is necessary for the creditor, before he is entitled to a warrant of arrest against the judgment debtor, to establish, to the satisfaction of the judge to whom the application for the issuing of a warrant is presented, by affidavit, that there is danger that the judgment debtor will leave the State or conceal himself, and there is reason to believe that he has property which he unjustly refuses to apply to the payment of the judgment. (*Netzel agt. Mulford, ante, 452.*)

12. Where the allegations in the affidavit, on which the warrant is asked are stated to be upon belief, and the fact of the defendant's having property is a mere matter

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of inference on the part of the plaintiff, based upon the fact that the defendant is a man of extravagant habits, living in the best of hotels, &c.:

Held, that such an affidavit is insufficient. (*Id.*)

13. The court, in granting a discharge from arrest when the arrest was made upon an execution issued without authority of law, has no power to impose a condition that the party thus discharged from an unlawful arrest shall not bring an action to recover his damages for such unlawful imprisonment. (*Mayer* agt. *Rothschild*, ante, 510.)

14. The irresistible effect of such a rule would be to compel a party to surrender one right to obtain another right to which he was entitled absolutely. (*Id.*)

15. Where, in an action upon contract, an order of arrest has been granted on the ground that the defendant was guilty of fraud in contracting the debt, and he has thereafter been arrested under an execution issued upon the judgment, an application for his discharge from imprisonment must be made under article 5, chapter 5, part 2, title 1 of the Revised Statutes, and not under article 6 thereof. (*Devlin* agt. *Cooper*, 20 *Hun*, 188.)

16. Where, in an inventory, attached to the application of an insolvent debtor for a discharge from imprisonment, all his debts were sufficiently set forth and described, except one, as to which the statement was probably insufficient, *held*, that the inventory was sufficient to give the officer to whom the application was made jurisdiction, and that a discharge granted by him would protect the sheriff in releasing the debtor from imprisonment. (*Id.*)

17. In an action on contract, the defendant was arrested under an

order of arrest, granted upon grounds extrinsic to the causes of action, and confined in the county jail. Subsequently he was taken and held by the sheriff under an execution against his person, issued upon a judgment entered in the action in favor of the plaintiff, which judgment was affirmed by the general term but was reversed by the court of appeals, by which latter court a new trial was granted because of errors committed on the trial:

Held, that the reversal of the judgment by the court of appeals only operated to restore the parties to the same position in which they were before any trial had been had, and did not supersede the order of arrest, or authorize the discharge of the defendant from confinement. (*People ex rel. Roberts* agt. *Bowe*, 20 *Hun*, 5.)

18. Under sections 549, 550, 557 and 558 of the Code of Civil Procedure, as amended by chapter 542 of 1879, in order to subject a defendant in an action upon contract, express or implied, to arrest for fraud in contracting or incurring the liability sought to be enforced, the facts showing such fraud on his part must be alleged in the complaint. (*Hecht* agt. *Levy*, 20 *Hun*, 53.)

19. The validity of an order of arrest is to be determined by the law existing at the time of the arrest of the defendant thereunder, and not by that existing at the time the order was issued. (*Id.*)

20. The fact that an order of arrest has been vacated, on the ground that the affidavit upon which it was granted failed to establish any fraudulent intent on the part of the defendant, does not prevent the court from granting a second order of arrest in the same action upon further facts, if satisfied that the application for such second order is not vexatious. (*Meucci* agt. *Raudnitz*, 20 *Hun*, 343.)

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21. Where a defendant has, before the entry of judgment in an action, been arrested and held to bail under an order of arrest, which order has not been vacated, and where the defendant has not been discharged therefrom, nor his bail exonerated, the plaintiff cannot, after the entry of judgment, procure his arrest for the same offense, upon a warrant issued under and by virtue of the Stilwell act. (*Townsend* agt. *Nebenzahl*, 20 Hun, 81.)
22. Discharge from, under the insolvent law — when granted — the fact that the defendant converted money received in a fiduciary capacity does not prevent his discharge. (*See Suydam* agt. *Belknap*, 20 Hun, 87.)
23. Undertaking given on procuring order of arrest — power of court to allow an amendment of defects therein. (*See Irwin* agt. *Judd*, 20 Hun, 562.)
24. A warrant of arrest cannot be issued under the provisions of the act "to abolish imprisonment for debt and to punish fraudulent debtors" (*chap. 300, Laws of 1881*), to enforce a judgment in an action in tort. To authorize the issuing of the warrant it must appear by the affidavit presented that the judgment was founded upon a contract, or that the cause of action was to recover damages for the non-performance of a contract, express or implied. (*People ex rel. Dusenbury* agt. *Spier*, 77 N. Y. 144.)
25. Accordingly, *held*, where an affidavit, presented for the purpose of obtaining a warrant under said statute, set forth a judgment in an action for obtaining money deposited in court by fraud and imposition, and in violation of an injunction, that defendant was not protected from arrest in that action by said statute; and that the affidavit did not give jurisdiction to issue a warrant under the statute. (*Id.*)
26. The recitals in a warrant of the governor of this state for the arrest of a fugitive from the justice of another state are to be taken, at least *prima facie*, as true. (*People ex rel. Draper* agt. *Pinckerton*, 77 N. Y., 245.)
27. A return therefore to a writ of *habeas corpus* setting forth such a warrant, which contains recitals of facts necessary to confer authority, under the Constitution and laws of the United States, to issue it, is a sufficient justification for holding the prisoner, without producing the papers or evidence on which the governor acted. (*Id.*)
28. As to whether the warrant is conclusive, or may be met by evidence on the part of the prisoner showing that the papers presented to the governor were, in fact, defective, *quære*. (*Id.*)
29. Where, in an affidavit upon which an order of arrest is granted, the facts are stated positively, not on information and belief, are not denied or disputed by defendant when opportunity is afforded, and the facts alleged are not such that the affiant could not by any possibility have sufficient knowledge of to verify, an appellate court, sitting in review of the order, may take the facts as stated. (*Pierson* agt. *Freeman*, 77 N. Y., 589.)
30. Where facts are thus positively affirmed, the affiant is not required to state the source of his knowledge or his means of information; this is necessary only where the facts are stated on information and belief. (*Id.*)

ASSIGNEE

1. An assignee for the benefit of creditors is not required, pending an action for the foreclosure of a

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mortgage made by his assignor, where the mortgagees have possession of the mortgaged lands, through a receiver, to pay taxes in arrears when the mortgaged lands are insufficient security. (*Matter of Lewis, ante, 251.*)

2. The statute has provided for the mode in which an assignee in an assignment for the benefit of creditors under the statute, where there has been a composition between the assignor and his creditors, may be discharged, which is on a proceeding for an accounting under the act (*Laws of 1877, chap. 466, section 20*). (*Matter of Assignment of Horsfall, ante, 265.*)
3. The only mode in which the court has power to discharge the assignee is upon proof of the composition in a proceeding for an accounting. (*Id.*)
4. It is essential and indispensable that there should be an accounting in every case, and that it cannot be dispensed with unless there has been a clear, distinct and undoubted waiver of it by every creditor who could in any way be affected by the assignee's discharge. (*Id.*)

ASSIGNMENT.

1. The creditors have an absolute right to examine into the affairs of the assignors, and for that purpose to inspect their books. (*Matter of Isidor and Hein, ante, 98.*)
2. The inspection need not be made by the creditor personally. He may designate some one to make it for him, and it cannot be an objection that the person so designated is an *expert*. (*Id.*)
3. A father made an assignment of all his property to his son, in consideration that the latter should pay four debts specified therein and support the grantor's wife

during her natural life. The conveyance was made by the father with intent to defraud his creditors, but was accepted by the son in good faith, with the desire to prevent his father from squandering the property, and in the belief that the debts named were all his father owed. On subsequently learning of the existence of other debts, the son paid some of them, in pursuance of an agreement with his father, by which he was to have a lien upon the property for the amounts so advanced by him. In this action, brought by a receiver appointed in proceedings supplementary to execution, to set aside the conveyance as fraudulent, *held*, that the son was properly allowed the amounts advanced by him in paying the debts of his father existing at the time of the assignment. (*Pond agt. Comstock, 20 Hun, 492.*)

ATTACHMENT.

See APPEAL.

Clafin et al. agt. Baers, ante, 20.

1. In an action against the members of a firm, the plaintiff, D., procured an attachment upon an affidavit which omitted to state that the amount which he claimed was due over and above all counter-claims known to him. Both defendants were non-residents. The one, B., upon whom personal service in the action was made appeared, but interposed no defense. The other, W., was not personally served with process, and publication was not made within the thirty days required by the statute. In another action by R., the attachment issued was also against both defendants, one of whom, B., appeared, but interposed no defense, and the other, W., was duly proceeded against by advertisement: *Held*, that D's attachment was bad, *ab initio*, because of the failure to comply with section 636 of

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the Code of Civil Procedure, in omitting to state that the plaintiff was entitled to recover the sum specified over and above all counter-claims known to him (*Per BARRETT, J.*).

Held, also, that the effect of non-publication was to destroy the attachment of D. as to W., and were it not for his failure to comply with section 636, the plaintiff, D., would be entitled to retain his attachment as to B. for whatever it was worth. It could not be absolutely discharged merely because no lien upon the firm's property had been thereby acquired (*Per BARRETT, J.*). (*Donnell agt. Williams et al., ante, 68.*)

2. A state court has jurisdiction of an action on contract brought by a resident of the state against a national bank incorporated under title 62 of the Revised Statutes of the United States located in another state. (*Robinson agt. National Bank of New Berns, ante, 218.*)

3. The last clause of section 5242, United States Revised Statutes, forbidding an attachment, injunction or execution to be issued against a national bank before final judgment in any proceeding in a state court applies only to such banks as have committed or are contemplating an act of insolvency. (*Id.*)

4. An attachment can, therefore, issue against a national bank, except under the above circumstances, from a state court as provided by the Code of Civil Procedure (*Affirming, S. C., 58 How., 806.*) (*Id.*)

5. After an attachment is invalidated by failure to serve or publish the summons within thirty days after the issuing of the warrant, though the court may acquire jurisdiction and proceed with the action *in personam* upon the service of the summons or the defendant's voluntary appearance at a later date,

yet the provisional remedy falls unless the service is effected or the publication commenced within the time prescribed by statute. A defendant has a right to move to vacate the attachment even if his object be to assist his assignees, the present Code expressly giving a status to other interested parties. (*Blossom agt. Estes, ante, 381.*)

6. The failure to allege, in the language of section 3169, subdivision 5 of the Code of Civil Procedure, that the defendant is an adult is not material. The law will presume that he is an adult, and what is presumed need not be otherwise proved in the first instance. (*Wenteler agt. Ross, ante, 397.*)

7. Facts stated in an affidavit upon information and belief are evidence where the affiant gives the sources of his information and a sufficient excuse for not obtaining the affidavits of the informants. (*Id.*)

8. A mere levy under an execution is not such an actual application of the attached property or the proceeds thereof, under section 682 of the Code of Civil Procedure, as to bar the right of the subsequent lienor to move to vacate the same, as provided in this section. (*Woodmansee et al. agt. Rodgers, ante, 402.*)

9. The language of this section of the Code means an actual and real application of the property or its proceeds, as distinguished from a constructive one. (*Id.*)

10. While the property remains, before it has been actually transferred to the plaintiff, or in case of sale, before its proceeds have gone to him, it is possible for the court to control and determine the liens upon it, fixing their order and enforcing their payment on the one hand, or discharging or removing them on the other (*Affirming S. C., 58 How., 439.*) (*Id.*)

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11. March 1, 1867, the Marine Bank of Chicago recovered a judgment, in the supreme court of this state, against T. Van Brunt, of the city of New York, who died December 29, 1867. Thereafter an action was commenced in this State by one Hammond against the said Marine Bank, in which an attachment was issued on June 20, 1869, under which the said judgment was attempted to be levied on, by serving a certified copy of the warrant upon one of the attorneys who represented the said Van Brunt in the action brought against him by the said bank. No copy of the attachment was served upon any of the legal representatives of Van Brunt's estate:
Held, that the attorney was not "an individual holding" the said judgment, within the meaning of section 235 of the old Code; that it could only be attached by service upon the debtor, as therein provided, and that as no such service was made the said judgment was never legally attached. (*Matter of Flandrow*, 20 Hun, 86.)
12. *It seems*, that a seizure and levy by a sheriff, under an attachment against one person, upon the entire property of a firm, as the sole property of the debtor, is not justified by showing that the debtor has an interest in the property as a copartner. (*Atkins* agt. *Saxton*, 77 N. Y., 195.)
13. The power of the sheriff, for the purpose of rendering the levy upon the interest of one partner in the co-partnership property effectual, to take possession of the whole property, is merely incidental to the right to reach the debtor's interest; and is to be exercised as far as possible in harmony with, not in hostility to, the rights of the other partners. (*Id.*)
14. When, therefore, the sheriff exceeds this limit; and, instead of levying on the debtor's interest, levies upon and seizes the property as the sole property of the debtor, he is a trespasser. (*Id.*)
15. An attaching creditor cannot defend an action brought by an assignee of the debtor, for the conversion of a chose in action attached, by showing fraud in the assignment. (*Castle* agt. *Lewis*, 78 N. Y., 181.)
16. The M. G. Co., a manufacturing corporation prior to May, 1872, had three trustees, one of whom resigned. One of the others was the treasurer and general agent of the company, having charge of its property and business. The two remaining trustees left a portion of the company's goods with B. & Co to sell on commission, and subsequently, in the name of the company, made an assignment of the goods unsold and of the proceeds of sales in the hands of B. & Co. to A., to secure a loan made by him to the company, and in pursuance of an arrangement made at the time of the loan. In actions brought by an assignee of A. against creditors of the company, who had caused the property and the avails of sales to be levied upon under attachments in their favor, defendants claimed the transfer to A. to be void for want of authority, as by the statute (*sec. 1, chap. 269, Laws of 1860, amending chap. 40, Laws of 1848*), it is required that such corporations shall have not less than three trustees:
Held, untenable; that the objection was not available in these actions, and defendants were not in a position to raise the same. (*Id.*)
17. It appeared that after the levy plaintiff sought to establish his title by the aid of a sheriff's jury; defendants' attorney appeared, and upon his request an adjournment was had upon his stipulating to give a bond of indemnity: he also received a portion of the proceeds of the sale of the goods;

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Held, that, in the absence of proof of want of authority in the attorney, defendants' interference with the property was sufficiently established to render them liable for the conversion. (*Id.*)

18. Upon motion made under the provisions of the Code of Civil Procedure (*sec.* 682), giving a person having a lien upon property attached, acquired subsequent to the attachment, a right to apply to vacate or modify it, it appeared that the attorney of the party claiming the lien delivered to the clerk of E. county a judgment-roll, including a sufficient statement in writing to warrant the entry of a judgment by confession in her favor against the attachment debtor; the clerk did not, in fact, enter the judgment, but delivered a transcript to the attorney, which was filed the next day in the office of the clerk of N. county, and execution issued to the sheriff of that county:

Held, that the lien acquired by the docket of the judgment in N. county and the issuing of execution, upon the personal property of the debtor in that county, was sufficient, until set aside, to confer upon the plaintiff therein the rights of a lienor under said provision. (*Steuben Co. Bk. agt. Alberger*, 78 N. Y., 252.)

19. The grounds upon which a warrant of attachment was issued were, as stated in the affidavit, that the attachment debtor was "about to assign, dispose of, or secrete his property with intent to defraud his creditors" All of the material facts were stated on information and belief only; it was not shown that the persons from whom the affiant professed to have obtained his information were absent, or that their depositions could not be procured:

Held, that the affidavit was insufficient to give the court jurisdiction to issue the attachment; and

that the order granting it was reviewable here. (*Id.*)

20. Where the affidavits upon which an attachment was granted, and those used in opposing a motion to vacate the same, show a state of facts authorizing the granting of the attachment upon the ground stated, an order denying the motion is not reviewable here. (*Whitaker agt. Imp. Skirt Mfg. Co.*, 78 N. Y., 621.)

ATTORNEY AND CLIENT.

1. It is the duty of the court, in a case where an attorney retains money collected by him, as compensation for professional services rendered and disbursements expended by him, to see to it that while the attorney is protected in his legal rights, and fairly compensated for his services, he does not take the slightest advantage of his particular relations to his client, or of the fact that the disputed moneys are in his own hands and may be retained by him under his lien until his compensation is adjusted. (*Matter of Knapp, ante*, 887.)
2. It must be shown, where the charges are against an executor, not only that they are a fair compensation for such services, but that they were the proper subject of charges against an executor, and were necessary under the circumstances. (*Id.*)
3. Interviews with creditors of the estate and the answering of their inquiries are not the proper basis of a claim against the client of the attorney. (*Id.*)
4. A lawyer has no right, while acting merely as a lobbyist, to ask the court to consider him as entitled to the protection and compensation generally regarded as due to the office of attorney and counselor. (*Id.*)

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5. Although an attorney is prohibited by the laws of the United States from charging or taking more than ten dollars for prosecuting a claim for a pension, such prohibition does not cover services rendered for the person claiming the pension after the certificate for the same was issued. (*Ades* agt. *Howe*, ante, 459.)

6. Dissolution of a firm of lawyers, by the death of one of them — duty of the survivor as to carrying on pending litigations, without charge, for the benefit of the estate of the deceased. (*See Sterne* agt. *Goep*, 20 *Hun*, 396.)

7. A surrogate has no authority, upon the accounting of an executor, to direct him to pay a sum to his counsel for the services of the latter; charges for services, rendered by an attorney to an executor, are against the executor individually, and there is no authority warranting a decree in favor of the attorney, against the estate, or against the executor as such. (*Seaman* agt. *Whitehead*, 78 *N. Y.*, 306.)

8. The allowances authorized to be made by the act of 1863, relating to proceedings in the surrogate's court (*sec. 8, chan. 362, Laws of 1863*), are to the executor himself, and allow him to charge the estate for such counsel fees as he has been obliged to pay, limited, however, by the rate prescribed by the act. (*Id.*)

9. It is not within the scope of the authority of an attorney in an action to change the rights of his client, except so far as it may be done in the action; he cannot justify the commencement of another action, or create a cause of action against his client which did not before exist. (*Arthur* agt. *Homestead F. Ins. Co.*, 78 *N. Y.*, 462.)

10. Where the court assigns counsel

to defend a prisoner, the counsel's claim, for his services, is not a legal charge against the county. (*People ex rel. Ransom* agt. *Supra. Nia. Co.*, 78 *N. Y.*, 622.)

BAIL.

1. The plaintiff in error upon being brought before the police justice of the town of Watervliet, acting as a court of special sessions, upon a warrant charging him with the offence of petit larceny, pleaded not guilty, and the said plea was duly entered in the minutes of the court. The case was then, upon his application, twice adjourned. On the last adjourned day he appeared and stated that he would waive an examination, and offered to give bail to appear and answer any indictment that might be found against him. The justice refused to permit him to do so, and he was thereupon tried and convicted, and sentenced for the said offence:

Held, that the accused by pleading to the charge, without objecting, and applying for and obtaining two adjournments, had waived his right to waive an examination and give bail. (*Devine* agt. *People*, 20 *Hun*, 98.)

2. Chapter 390 of 1879. Does not restrict the power of a justice of the supreme court to admit to bail one arrested for a criminal offense. (*People ex rel. Comaford* agt. *Dutcher*, 20 *Hun*, 241.)

3. The exercise of the power given by the provision of the Revised Statute (2 *R. S.*, 728, *sec. 56*), authorizing a justice of the supreme court to admit to bail a person indicted for a bailable offense, if the court having cognizance of the offense is not, at the time sitting, is not restricted to the county in which the indictment was presented; and, under that provision, one arrested upon a warrant after indictment may be admitted to bail

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by a justice in the county where he is arrested, although the indictment was found in another county. (*The People* agt. *Clews*, 77 N. Y., 89.)

4. Said provision was not repealed or altered by the provision of the act of 1830 (*sec. 62, chap. 320, Laws of 1830*), providing for the issuing of warrants of arrest after indictment found, which prescribes proceedings upon such warrants when served in a county other than that in which the indictment was presented. The purpose of the later enactment was to add to, not to repeal, alter or amend the former one. (*Id.*)

BANK.

1. An out of town note or draft deposited with a bank for collection may be sent by mail to the bank on which it is drawn or made payable, provided that be the ordinary method of transacting such business. Such first-mentioned bank is authorized to surrender the note given for collection to the bank upon which it was drawn on receiving its draft for the amount. (*Nidig* agt. *National City Bank of Brooklyn*, ante, 10.)
2. In an action against a bank for negligence, while acting as a collection agent, it is incumbent on the plaintiff to prove in what respect the defendant has been negligent. So long as the collecting agent has pursued the ordinary and reasonable methods of making the collection, it is free from fault. What is sufficient evidence of agency considered. The effect of not presenting a note or check payable at the particular place where it is payable discussed and explained. Payment made by check or note, when inoperative if such check or note be dishonored. Effect of failure of the bank pending the collection. Insolvency must be proved and will not be presumed. (*Id.*)

BANKRUPTCY.

1. A discharge in bankruptcy may be pleaded by a simple averment, that on the day of its date it was granted to the bankrupt, setting forth a copy thereof. In such a case it is not necessary for the defendant to allege the facts which show that the court of bankruptcy had jurisdiction of the party or of the subject-matter. (*Cromwell et al.* agt. *Burr*, ante, 98.)
2. All other proceedings which are relied upon to discharge a bankrupt from his debts must, when pleaded, be accompanied by averments which show that the court in which they were taken had jurisdiction of the parties and of the subject-matter. Such proceedings are regarded as the judgment of an inferior court of special and limited jurisdiction, or as a discharge in insolvency, and jurisdiction must be shown by the averment of facts which conferred it (*Id.*)
3. This court has jurisdiction in all actions, legal or equitable, brought by an assignee in bankruptcy to recover the estate of the bankrupt, or to determine rights to property claimed by him as such assignee, or in any way affecting the same, and the jurisdiction conferred upon the Federal courts by section 1 of the bankrupt act was not exclusive. Nor does the subsequent amendment to that section passed June 22, 1874, affect the statute in this respect (*Rutherford* agt. *Howey et al.*, ante, 281.)
4. An assignee in bankruptcy may maintain an action for partition. (*Id.*)
5. Leave of the bankruptcy court is not necessary before commencing the action. (*Id.*)
6. The two years' limitation of the bankruptcy act has no application to such a case as this. The suit

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is not to recover property in dispute or to which there is any adverse claim, but it is brought for the purpose of getting it into a situation where it will bring the largest sum to the estate. (*Id.*)

7. Nor does the discharge of the bankrupt restore to him this property. (*Id.*)

See SAVINGS BANKS.

Hun agt. *Cary et al.*, ante, 426.

8. This action was brought by the plaintiff to recover for services rendered to, and for lumber converted by the defendant as assignee in bankruptcy of one Sisson. In the summons and complaint the defendant was named "as assignee," and the services were alleged to have been rendered to, and the property to have been converted by him, as such assignee;

Held, that for services rendered to the defendant after his appointment as assignee, and for property converted by him, whether or not the proceeds were applied to the use of the bankrupt estate, he was liable individually and not in his representative capacity as assignee. That the allegations showing that the defendant was sued as assignee and not individually could not be disregarded, and that the complaint must be dismissed. (*Griswold* agt. *Watkins*, 20 *Hun*, 114.)

9. *Semble*, that even if the bankrupt's estate could be held liable for such acts of the assignee, the United States courts would, under subdivision 6 of section 711 of the United States Revised Statutes, have exclusive jurisdiction of an action to reach the assets of the bankrupt. (*Id.*)

10. State courts have jurisdiction of an action by an assignee in bankruptcy to set aside and have declared void a chattel mortgage executed by the bankrupt, on the ground that it constitutes a

fraudulent preference within the bankrupt act, and to compel an accounting on the part of the mortgagee; it is not a matter or proceeding in bankruptcy within the meaning of section 711 of the United States Revised Statutes. (*Ansley* agt. *Patterson*, 77 *N. Y.*, 156.)

11. The remedy given by the bankrupt act (*U. S. R. S.*, sec. 5120), by application to the district court which granted a discharge, to annul it, applies only to cases where, upon some of the grounds specified, the creditor could have successfully opposed the granting of the discharge, had he known of the facts at the time of the application. (*Poillon* agt. *Lawrence*, 77 *N. Y.*, 207.)

12. The remedy given by said act is exclusive only when the invalidity of the discharge is based on one or more of the grounds specified therein. (*Id.*)

13. A discharge may be attacked by a creditor, in an action in a state court to recover his debt, for a fraud which is not one of those specified, and which does not necessarily affect its validity except as to the creditor. (*Id.*)

14. Where a discharge in bankruptcy is pleaded, the territorial jurisdiction of the court, granting the discharge, to entertain the proceedings, is an issuable fact. (*Id.*)

15. *It seems*, that a discharge in bankruptcy of one member of a co-partnership, under proceedings giving no schedule of firm debts or assets, and not praying for a discharge from firm liabilities, will not relieve the bankrupt from such liabilities. (*Id.*)

16. As to whether it bars recourse to the separate estate of the bankrupt for a firm debt, *quære*. (*Id.*)

17. An action for the conversion of securities, pledged to the defend-

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ant as collateral security for a loan, is barred by the defendant's discharge in bankruptcy. (*Hennequin* agt. *Clews*, 77 N. Y., 427.)

18. The cause of action is not a debt "created by the fraud * * * of the bankrupt, * * * or while acting in any fiduciary capacity," within the meaning of the provision of the bankrupt act, declaring that such debts shall not be discharged by proceedings in bankruptcy (*U. S. R. S.*, sec. 5117). (*Id.*)

19. The word "fraud," as used in said provision, means an active, express fraud, not one implied from an unjustifiable or illegal act. (*Id.*)

BEQUESTS TO CORPORATIONS.

See WILL
Kerr agt. *Dougherty*, ante, 44.

BONA FIDE HOLDER.

1. To constitute an indorsee of negotiable paper a holder for value so as to exclude the equities of antecedent parties he must have relinquished some right, incurred some responsibility or parted with value upon the credit of the paper at the time of the transfer. (*Phoenix Insurance Company* agt. *Church*, ante, 293.)

2. If the indorsee, at the time of receiving a diverted note, surrenders a pastdue check held by him and made by the person delivering such diverted note he becomes a *bona fide* holder for value and is entitled to recover, and this whether the surrendered note be not due or overdue. (*Id.*)

3. The rule, however, is technical and is not to be extended to a bank check surrendered under similar circumstances. (*Id.*)

4. The distinction consists in this, that the note is given as the representative of the debt while the check is not. Nor is it even a security for it; it is taken in place of money. Its delivery amounts to a representation by the drawer that there are funds in the bank upon which it is drawn sufficient to meet it, and if the representation proves untrue the check is a false token and does not, in any sense, pay or discharge the debt. (*Id.*)

5. The courts of this state will not take judicial notice that the law of another state differs from our own. (*Id.*)

6. The various cases reviewed (*See same case*, reported vol. 56, pp. 29, 493). (*Id.*)

BURDEN OF PROOF.

1. This action was brought by the plaintiff to recover certain bonds, claimed to have been the property of his intestate at the time of his death, which were held by the defendant, and which she had refused to deliver upon the plaintiff's demand. The answer admitted the plaintiff's appointment as administrator and that the intestate owned the bonds in his life-time, but averred that prior to his decease they became the property of the defendant by a *donatio mortis causa*, and that she then took and thereafter continuously kept possession of them:

Held, that the defendant held the affirmative, and that the burden of establishing the alleged gift rested upon her. (*Conklin* agt. *Conklin*, 20 Hun, 278.)

2. The defendant, who was the widow of the intestate, testified that a few days before his death she took possession of the bonds, and kept continuous possession thereof until after his death, when she deposited them with a friend:

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Held, that this evidence failed to show, as between a husband and his wife, a change of the title to the bonds, or in any legal sense a change of his possession thereof, and was insufficient to establish a gift from the husband to his wife. (*Id.*)

8. Where, in an action to recover property delivered to a warehouseman, the plaintiff proves a refusal or omission on the part of the warehouseman to deliver the property after the same has been duly demanded, the burden of proof is shifted, and the defendant is bound to account for the property and excuse his omission to deliver the same. (*Golden agt. Romer*, 20 *Hun*, 438.)

4. In cases where contributory negligence may be claimed, the absence thereof is part of the plaintiff's case, and the burden of satisfying the jury on that point is upon plaintiff. (*Hale agt. Smith*, 78 *N. Y.*, 480.)

CEMETERY LOT.

1. Where a person has taken a conveyance of a burial lot, and has made interments therein of the dead of his family, it is in such condition that it cannot be mortgaged to secure the payment of a debt or the return of money borrowed. (*Thompson agt. Hickey*, *ante*, 434.)

CERTIORARI.

1. A writ of *certiorari* will not lie to the corporation of the city of New York to correct alleged errors of the board of assessors, or of the board of revision and correction of assessments therein. (*People ex rel. Robbins agt. Mayor*, 20 *Hun*, 78.)
2. The writ must be directed to the board having the matter in charge

at the time it issues from the court. (*Id.*)

3. A *certiorari*, to review summary proceedings for a forcible entry and detainer, may be issued after the defendant had traversed the inquisition, and before the proceedings upon the said traverse have been completed. (*People ex rel. Pierce agt. Covill*, 20 *Hun*, 460.)

4. Where assessors for a local improvement adopt the correct legal rule, i. e., that all property benefited must be assessed, an error in determining what property is in fact benefited must be reviewed and corrected by *certiorari* not by suit. (*Kennedy agt. City of Troy*, 77 *N. Y.*, 493.)

5. It is within the discretion of the supreme court to grant or withhold a common law *certiorari*, and its discretion cannot be reviewed. (*People ex rel. Hudson agt. Bd. Fire Comrs.*, 77 *N. Y.*, 605.)

6. An unreasonable delay in applying for the writ may be a ground for refusing it, and for quashing it even after a hearing on the return thereto. (*Id.*)

CITIZENSHIP.

1. Where a person asking to be registered claims to be a citizen by virtue of the naturalization of his parents, the best evidence of the naturalization of the parent would be the original certificate of naturalization, or a duplicate thereof, when it can be obtained. But a party may, in the matter of proving his citizenship, resort to secondary evidence when preliminary evidence cannot be obtained. (*The People ex rel. O'Donnell agt. McNally*, *ante*, 500.)
2. Where the relator stated to the inspectors, under oath, that he was born in Ireland, and is of full age; that he came to this country

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when he was about five or six years old; that his father was a citizen as early as 1853, and that he has seen his father vote, but is unable to give the date of his father's certificate of naturalization, although he had seen it; that the relator has voted in this city for the last fifteen years, and that he claimed the right to be registered on the ground of his father having been naturalized long before the relator became of age; that his father had been dead for over twenty years:

Held, that in the absence of anything impeaching the relator's testimony, his oath is *prima facie* evidence of the truth of his statements, and a case is made out in which it is impossible for the person seeking registration to produce the certificate of naturalization of his father.

Held, further, that in such a case the party is entitled to the benefit of secondary evidence to establish his right to vote, and that the alleged elector is just as competent to prove that fact as he is to prove that he is a native born citizen, is twenty-one years of age, his place of birth, his residence and that he has lived for the requisite time in the state, county and election district. (*Id.*)

CODE OF PROCEDURE.

1. Section 11 — Before an action of trespass can be said to affect the title to real estate, within the meaning of the provision of the Code of Procedure (*sec. 11, as amended by chapter 322, Laws of 1874*), limiting appeals to this court, the issues, trial and judgment must be such as to determine or establish the title in favor of one party or the other. (*Scully agt. Sanders, 77 N. Y., 598.*)
2. Section 91, subdivision 5 — Statute of limitations — When amendments thereto are applicable to existing causes or action. (*See*

Dubois agt. City of Kingston, 20 Hun, 500.)

3. Section 94 — Statute of limitations — What amendments thereto are applicable to existing causes of action. (*See Dubois agt. City of Kingston, 20 Hun, 500.*)
4. Section 99 — The provision of this section of the Code of Procedure, declaring that an action shall be deemed commenced, within the meaning of the statute of limitations, when the summons is delivered to the sheriff or other officer with intent that it shall actually be served, applied only to defendants who were parties to the action at the time of such delivery, or who were made parties before the statute had run against the claim upon which the action was brought. Such delivery of the summons did not prevent the running of the statute in favor of persons who, although liable upon the obligation sued upon, were not named as defendants in the summons; and it is immaterial whether the omission was by design or through ignorance, mistake or inadvertence.
So, also, where by order amending the summons a new party defendant was brought in, the suit was only commenced as to him when thus brought in; and if between the time of the commencement of the action as to the original parties, and the time when the new defendant was brought in, the period of limitation had expired, a plea of the statute in bar of his liability is good. (*Shaw agt. Cock, 78 N. Y., 194.*)
5. Sections 172, 272 — A referee had power, under these sections of Code of Procedure, on motion made at the close of the evidence in a case, to allow an amendment of a pleading so as to conform it to the proof, where it does not substantially change the cause of action or defense.
Where the referee, without ob-

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jection on the part of the opposite party, reserved his decision on motion made for such an amendment, and granted it on deciding the case:

Held, proper. (*Chapin et al. agt. Dobson*, 78 N. Y., 74.)

6. Section 285 — Attachment of a judgment — Service of warrant — when it must be made on the debtor himself — the attorney not "an individual holding" the judgment, within meaning of said section. (*See Matter of Flandrow*, 20 Hun, 36.)

7. Section 302 — The court has no power to release a defendant held under an execution against his person, because of his inability to endure the imprisonment.

Section 302 of the Code authorizing the release of a person committed for a contempt, in case of his inability "to endure the imprisonment," is not applicable to one who is suffering from a malarial fever, but only to one suffering from a disease in the nature of a slow wasting, a steady diminution of the vital forces, tending, unless arrested by sunlight, open air, proper exercise, or the enjoyment of freedom, to a complete destruction of his constitution, and, as a not remote consequence, death. (*Moore agt. McMahon*, 20 Hun, 44.)

8. Section 305 — Defendants who sever in their defense and all of whom succeed are entitled to separate bills of costs under this section as matter of law, subject, however, to the power of the court to confine them to one bill in case it should be made to appear that they had made their separate defenses collusively to enhance costs. (*Williams agt. Cassidy et al.*, ante, 490.)

9. Section 309 — Under the judiciary act the poundage of the referee on foreclosure and sale is limited to ten dollars, and is not in-

creased by the act of 1876 amending this section of the Code of Procedure.

This amendment does not give the right to such fees or poundage, but is merely a limitation of the fees or poundage allowable, the right thereto being dependent upon other statutory provisions.

If the seventy-seventh section of the judiciary is repealed the referee is remitted to the three dollars per day under the general rule as to referees' fees. (*Birge agt. Ainsworth et al.*, ante, 473.)

10. Section 309 — Additional allowance — when a case is difficult and extraordinary so as to justify it. (*See Morrison agt. Agate*, 20 Hun, 23.)

11. Section 313 — An oral agreement between the parties to an action on trial before a referee, entered by a stenographer upon his minutes, leaving it to the referee to fix his own compensation, is not an agreement in writing by the parties for another rate of compensation than that prescribed, such as is authorized by the provision of this section regulating referees' fees.

If such an agreement can be considered one in writing, it is not binding as it does not fix any rate of compensation.

The cases holding that oral agreements between parties or their attorneys, made in open court, in respect to matters connected with the litigation, are binding and will be enforced, have no application to such an agreement, as it has reference to a matter wholly collateral to the litigation which is regulated by statute. (*First National Bank agt. Tamajo et al.*, 77 N. Y., 476.)

12. Section 348 — This plea was interposed in an action upon an undertaking given on appeal. It appeared that a former action had been brought, the complaint in which omitted to allege that notice of judgment had been served as

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required by this section of the Code of Procedure; the complaint was demurred to and demurrer sustained because of this omission; and before the commencement of the second action the former suit had proceeded to final judgment on the demurrer, which judgment remained unsatisfied. Notice of judgment was served after the commencement of the first and prior to the second action.

Held, that the plea was not sustained; also that the former judgment was not a bar. (*Porter* agt. *Kingsbury et al.*, 77 N. Y., 164.)

13. Section 371 — Judgment in justice's court — who entitled to costs on a partial affirmance of such judgment by the county court. (*See Chapin* agt. *Skeel*, 20 Hun, 448.)

14. Section 375 — The proceeding provided for by this section to bind a joint debtor not originally summoned is a special statutory proceeding, and a party defendant is entitled to twenty days' notice, and this although the suit be in the marine court. (*Kernochan* agt. *Bland*, ante, 97.)

15. Section 399 — In an action upon a promissory note, the defense was, in substance, that defendants purchased for plaintiff, and with her money, certain United States bonds; that she, not desiring to be known as the purchaser, they were bought in a defendant's name, and left in their hands for safe keeping, the note being given as a means of insuring the delivery of the bonds when called for, or of obtaining a compensation therefor if they were withheld; and that the bonds were subsequently delivered to plaintiff's husband, who was her authorized agent. Upon the trial one of the defendants was allowed to testify to conversations with plaintiff's husband, who was then deceased, in one of which he requested witness to go and purchase the bonds in his own name. No authority

had then been shown in plaintiff's husband to act for her, and the evidence was objected to on that ground; the authority was subsequently proved, and it appeared from the record that the trial court knew that this should be established before the declarations were competent:

Held, that the objection was simply to the order of proof, which is always in the discretion of the court, and so was untenable.

Also, *held*, that the testimony was relevant.

The testimony was also objected to as in violation of the spirit of this section of the Code of Procedure.

Held, untenable. (*Platner* agt. *Platner et al.*, 78 N. Y., 90.)

16. Section 399 — In an action by a grantee of mortgaged premises to have the mortgage canceled as paid, declarations of the mortgagor while the owner and in possession, as to payments made by him on the mortgage, are not competent as evidence against plaintiff.

One, through whom the plaintiff in such action derived title, is incompetent, under this section of the Code of Procedure to testify as to declarations made by the mortgagor, he being at the time deceased. (*Footte* agt. *Beecher*, 78 N. Y., 155.)

17. Section 399 — The surety upon the bond of a non-resident executor is interested in the event of the accounting of his principal, within the meaning of this section of the Code of Procedure.

Accordingly *held*, that such a surety was incompetent to testify, as a witness on behalf of the executor, to a personal transaction or communication between him and the deceased. (*Miller* agt. *Montgomery et al.*, 78 N. Y., 282.)

CODE OF CIVIL PROCEDURE.

1. Sections 25, 52 and 53 — Summary proceedings under the stat-

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- utes to recover the possession of lands, &c., commenced before one marine court justice may be continued before another by consent of the parties. (*People ex rel. Jackson* agt. *McAdam*, ante, 465.)
2. Section 149 — A defendant's right to the jail liberties under this section, is not in the least affected by a direction that he give an undertaking in the form prescribed by subdivision 1 of section 575. If the defendant does not desire to to give the bail required by the order to effect his discharge, he has a perfect right to offer the limit bond under this section, and the sheriff would be bound to accept it. (*Boucicault* agt. *Boucicault*, ante, 131.)
3. Section 183 — By an amendment of this section the defendant has twenty days after the service of the order of arrest, to move to vacate the same. (*Kohn* agt. *Burnett*, ante, 410.)
4. Section 190 — An order vacating and setting aside an *ex parte* order discharging an assignee for the benefit of creditors, and his sureties from all liability to the creditors, and canceling his bond, is in the discretion of the court, and is not reviewable here.
Such an order also is not appealable, as it is not a final order within the provision of the Code of Civil Procedure (*sub. 3, sec. 190*), regulating appeals to this court. (*Matter of Horsfalls*, 77 N. Y., 514.)
5. Section 191 — Where, in an action for divorce on the ground of adultery, trial is had before a referee, and judgment rendered upon his report in favor of defendant, which is reversed by the general term on questions of fact and a new trial ordered, the order of general term is appealable to this court, the appellant giving the usual stipulation required by this section of Code of Civil Procedure. (*Conger* agt. *Conger*, 77 N. Y., 432.)
6. Section 420 — Under this section, judgment by default in an action for conversion, can be entered only on application to the court. (*Horton* agt. *La Due*, ante, 454.)
7. Section 440 — Order for service of summons by publication—when sufficient—designation of newspapers. (*See Green* agt. *Squires*, 20 Hun, 15.)
8. Section 448 — That there is a misjoinder of parties defendant is not a ground of demurrer. The defect of parties defendant for which a demurrer may be interposed under this section, is a deficiency. (*Fish* agt. *Hose*, ante, 238.)
9. Section 448 — *It seems*, that where there is a pressing need to enforce a lien for the benefit of the trust, one of several trustees, as sole plaintiff, may bring an action for that purpose, when his associates will not join; in which case they may be made defendants. (*Bockes* agt. *Hathorn*, 78 N. Y., 222.)
10. Section 452 — Right of one interested in an action to be made a party thereto—when such right is absolute. (*See Earle* agt. *Hart*, 20 Hun, 75.)
11. Section 452 — Where an action is brought by the attorney-general to vacate the charter of a railroad corporation, which has leased a portion of its road to another company, the lessee has such an interest in the subject of the action and in the real estate to be affected by the judgment as to entitle it, under this section of the Code of Civil Procedure, upon application for that purpose, to be made a party defendant.
This is especially so when the interests of the lessor are protected by stipulations rendering the judgment innocuous as to it, though fatal to the rights of the lessee, and where there is reason to suppose that the lessor is not unfriend-

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ly to such a judgment. (*The People* agt. *Albany and Vermont R. R. Co.*, 77 N. Y., 232.)

12. Sections 524, 526 — Denial of allegations in the complaint may be made upon information and belief.

A party has no right to interpose an unqualified denial in a verification, unless it be founded upon personal knowledge, and where he has not personal knowledge, but has knowledge or information sufficient to form a belief, he is not only permitted but bound, at his peril, to deny upon information and belief. (*Brotherton* agt. *Downey*, ante, 206.)

13. Section 549 — Under this section judgment by default in an action for conversion can be entered only on application to the court. (*Horton* agt. *La Due*, ante, 454.)

14. Section 549 — An action against a common carrier for loss of baggage, when founded on the breach of the carrier's legal duty is in tort, and for an injury to property and within this section of the Code of Civil Procedure and not on contract. (*Catlin* agt. *Adirondack Co.*, 20 Hun, 19.)

15. Sections 549, 550, 557 and 558, as amended by chapter 542 of 1879 — On arrest for fraud in contracting a debt — the facts establishing the fraud must be alleged in the complaint. (*See Hecht* agt. *Levy*, 20 Hun, 53.)

16. Section 549 — Where, in an affidavit upon which an order of arrest is granted, the facts are stated positively, not on information and belief, are not denied or disputed by defendant when opportunity is afforded, and the facts alleged are not such that the affiant could not by any possibility have sufficient knowledge of to verify, an appellate court, sitting in review of the order, may take the facts as stated.

Where facts are thus positively affirmed, the affiant is not required to state the source of his knowledge or his means of information; this is necessary only where the facts are stated on information and belief. (*Pierson* agt. *Freeman*, 77 N. Y., 539.)

17. Section 550 — Subdivision 4 of this section was intended, and is a substitute, for the writ of *ne exeat*. As the judgment in a divorce suit may require the performance of an act, the neglect or refusal to perform which would be punishable by the court as a contempt, the case is brought within subdivision 4 of this section. (*Boucicault* agt. *Boucicault*, ante, 131.)

18. Section 575 — An order of arrest is not irregular which prescribes the form of undertaking as directed in subdivision one of this section. (*Boucicault* agt. *Boucicault*, ante, 131.)

19. Section 576 — Where the defendant was held on an order of arrest, a motion having been made upon affidavits to vacate the order of arrest, a reference was ordered, and pending the reference the action was tried and judgment was rendered for the amount of the debts and costs, the judge declining to hear evidence on the question of fraud. An execution having been issued against the person of defendant, a motion was made to set it aside:

Held, that the application was made in this case before judgment and in season. The judgment only determined the fact and amount of the defendant's indebtedness, and not necessarily what kind of execution may be issued to enforce it. The question whether the execution could be issued against the body could only be determined in this action by the existence of the order of arrest after the defendant had lost the right to move to vacate such order. (*Kohn* agt. *Burnett*, ante, 410.)

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20. Section 601 — Special term has power to grant sheriff such further time, after answer, as it deems just, to surrender a defendant charged in execution. (*Douglas* agt. *Haberstra*, ante, 194.)
21. Section 604 — Where the action was to recover damages for false representations made by the defendants, except H., by which plaintiffs parted with a large amount of goods, and while judgment is asked against the defendants, other than H., for the amount so lost, the suit is against H. to restrain him from parting with, or disposing of, goods assigned to him, pending the action: *Held*, that under a proper construction of section 604, subdivision 2, an injunction should not be granted. (*Jerome Co.* agt. *Loebe & Co. et al.*, ante, 508.)
22. Section 636 — An attachment is bad *ad initio* where the affidavit omits to state as required by this section, that the plaintiff was entitled to recover the sum specified over and above all counterclaims known to him. (*Donnell* agt. *Williams et al.*, ante, 68.)
23. Section 682 — A mere levy under an execution is not such an actual application of the attached property or the proceeds thereof, under this section of the Code of Civil Procedure, as to bar the right of the subsequent lienor to move to vacate the same, as provided in this section.
The language of this section of the Code means an actual and real application of the property or its proceeds, as distinguished from a constructive one.
While the property remains, before it has been actually transferred to the plaintiff, or in case of sale, before its proceeds have gone to him, it is possible for the court to control and determine the liens upon it, fixing their order and enforcing their payment on the one hand, or discharging or removing them on the other (*affirming S. C.*, 58 *How.*, 439). (*Woodmansee et al.* agt. *Rogers*, ante, 402.)
24. Section 724 — A case which the provision of this section permitting the court to relieve a party from a judgment order, or other proceeding within one year after notice, does not affect as in the absence of an express prohibition, courts have always control over their own proceedings. (*In Matter of City of Buffalo*, 78 *N. Y.*, 362.)
25. Section 740 — An offer of judgment signed by defendant's attorney, to which no affidavit showing his authority to make it is annexed, as required by this section of the Code of Civil Procedure is invalid. (*Riggs* agt. *Waydell*, 78 *N. Y.*, 586.)
26. Section 749 — An offer of judgment signed by defendants' attorney, to which no affidavit showing his authority to make it is annexed, as required by this section of the Code of Civil Procedure, is invalid. (*Riggs* agt. *Waydell et al.*, 78 *N. Y.*, 586.)
27. Section 757, as amended by chapter 542 of 1879, is only applicable to the case of a sole plaintiff or defendant — words "sole defendant" cannot be construed as meaning "all defendants." (*See Coit* agt. *Campbell*, 20 *Hun*, 50.)
Quare — as to how far the court is bound under this section, as amended, to allow a continuance of the action in all cases, no matter how great the laches of which the applicant has been guilty. (*Id.*)
28. Section 758 — The provision of this section of the Code of Civil Procedure, providing that the estate of one jointly liable with others shall not be discharged by his death, does not affect contracts entered into before its passage. The provision is not merely remedial, as it imposes, in some cases,

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an obligation where none existed before.

Where, therefore, after action brought against two sureties upon a joint undertaking given upon appeal prior to the passage of said Code, one of the defendants died, *held*, that his liability ceased upon his death; and that a motion to revive the action against his executors, and to substitute them as defendants, made after said Code went into effect, was properly denied. (*Randall* agt. *Sackett*, 77 N. Y., 480.)

20. Sections 763, 765, 1010 and 1022 — The decision intended by sections 763, 765, 1010 and 1022 of the Code is the written findings of facts and the legal conclusions with the direction for the final judgment to be entered, and which must constitute a part of the judgment roll.

Until such a *decision* is signed and filed the cause is not removed from the authority of the trial court, but remains within its control; and although the justice may have signed and delivered his opinion stating the facts and conclusions, and the judgment that should be entered, other and different findings and conclusions may properly be made and a different judgment be directed from that stated to be proper in the opinion (*See Weyman* agt. *The National Broadway Bank*, *ante*, 331). (*Adams* agt. *Nellis*, *ante*, 385.)

20. Sections 763, 1210 — On March 24, 1876, plaintiff obtained a verdict against defendant. Judgment was suspended until exceptions could be heard at general term. They were argued in November, 1876, and in May, 1877, the exceptions were overruled and judgment ordered on verdict. The defendant died after argument and before decision. Plaintiff, following the practice prescribed by the Code of Civil Procedure (sections 763, 1210), entered up judgment in

the names of the original parties. In March, 1879, the general term, on application of plaintiff, granted an order vacating the judgment, and directing that it be "re-entered *nunc pro tunc* as of the day when the said verdict was rendered."

Held, error; that the case was within the said provisions of the Code, and that the general term had no power to make the order. (*Tuomy* agt. *Dunn*, 77 N. Y., 515.)

81. Section 765 — Where a party dies before the "decision" is actually signed or rendered against him, in a cause tried before the court, such decision and all subsequent proceedings, including the judgment entered thereon, are void under this section of the Code, although an *opinion* in duplicate directing the findings of facts and conclusions of law, and giving the reasons therefor, was signed and delivered by the justice to the respective attorneys while such party was living. (*Adams* agt. *Nellis*, *ante*, 385.)

82. Section 770 — Under this section, in the first judicial district, a motion, which elsewhere must be made in court, may be made to a judge out of court, except for a new trial upon the merits. An application for an order of arrest may be so made. (*Boucicault* agt. *Boucicault*, *ante*, 131.)

83. Section 799 — An order for the inspection of books, as also an order to show cause why an answer should not be stricken out because of a failure to comply with such order for inspection, may be served on the attorney. (*See Rossner* agt. *New York Museum Association*, 20 Hun, 132.)

84. Section 803 — Directors of a corporation cannot be required to produce before trial, for the inspection of the opposite party, the books of the corporation, or to give him sworn copies of entries therein, under the provision of

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this section authorizing the court to compel such production or copy by "a party to an action. (*Boorman* agt. *Atlantic and Pacific R. R. Co.*, 78 N. Y., 599.)

35. Section 812—Who are householders within the meaning of this section. (*Delamater* agt. *Bryne*, ante, 71.)

36. Section 829—One Cornelia Wolford died leaving a will by which she devised all her property to Sarah A. Schoonmaker, and appointed the said Sarah and her husband executors thereof. An application made by the executors for the probate of the will was opposed by the three brothers of the deceased, her only heirs-at-law and next of kin, on the ground that she was of unsound mind and incapable of making a will. Upon the hearing one of the brothers was allowed by the surrogate, against the objection and exception of the proponents of the will, to testify as to personal transactions had with the deceased. Subsequently the other brothers were allowed to give similar testimony, without any specific objection to it being made or exception to it taken by the said proponents.

Upon an appeal from a decree of the surrogate refusing to admit the said will to probate, *held*, that this section of the Code of Civil Procedure forbidding any person interested in the event of an action or special proceeding from testifying in his own behalf as to any personal transactions or communications with the deceased, as against his executor, or any person interested through or under him, was applicable to surrogates' courts.

That although technically the proponents were neither executors of or legatees under the will until it was admitted to probate, yet, as it was well executed as regarded all legal formalities, they held before the surrogate the position

of executors and legatees, and were protected by the said section.

That the evidence was inadmissible under the said section, and that it should have been rejected. (*Schoonmaker* agt. *Wolford*, 20 Hun, 166.)

37. Section 829—In an action by an administrator to set aside an assignment of a mortgage made by his intestate, the next of kin, though interested in the event of the action, and claiming their rights through the plaintiff, are not prohibited, by this section of the Code of Civil Procedure, from testifying, in his behalf, as to what they had noticed and observed in the conduct and actions of the intestate, and as to personal transactions of his with which they had no connection, and also as to communications made by him to others in their presence without any inducement, suggestion or participation on their part. (*Holcomb* agt. *Holcomb*, 20 Hun, 156.)

38. Section 837—When a witness will be excused from testifying on the ground that it will have a tendency to accuse himself of any crime or misdemeanor, or to expose him to any penalty or forfeiture. (*Greensward* agt. *Union Dime Savings Institution*, ante, 399.)

39. Section 870—Plaintiff may examine defendant, to obtain facts necessary to frame the complaint—the affidavit need not state that the deposition is to be used on the trial. (*See Brisbane* agt. *Brisbane*, 20 Hun, 48.)

40. Section 870—An order requiring a party to an action to appear for examination before trial, under the provisions of this section of the Code of Civil Procedure, must be served personally upon him; a service on his attorney is not sufficient to give the court jurisdiction to punish him for not obeying the order. (*Tabo* agt. *Baker*, 77 N. Y., 83.)

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41. Section 870—The words, "party to an action," in the provision of this section of the Code of Civil Procedure, providing for the taking of the deposition of a party before trial, includes only parties to the record; that a person is a party in interest is not sufficient to authorize his examination under said provision. (*Seeley* agt. *Clark*, 78 N. Y., 220.)

42. Section 870—The provision of this section of the Code of Civil Procedure, authorizing the taking of the deposition "of a party to an action," before trial, at the instance of an adverse party, does not authorize the examination of the directors of a corporation, which is a party. (*Boorman* agt. *Atlantic and Pacific R. R. Co.*, 78 N. Y., 599.)

43. Section 872, subdivision 4—After the service of an amended complaint herein, and before the service of an amended answer, the defendant applied for an order requiring the plaintiff to appear and be examined before trial. The defendant's affidavit set out at length the nature of the action, the relief sought and the various matters alleged in the complaint, and alleged that the deponent was advised and believed that it was material and necessary, in the preparation of his answer, that he should be permitted to examine the plaintiff as to the allegations set forth in the complaint. The affidavit then set forth the allegations as to which the plaintiff was to be examined, but no facts tending to show such examination to be necessary or material, nor did it set forth the nature of the defense to be interposed.

Upon an appeal from an order requiring the plaintiff to appear and be examined, *held*, that the affidavit was defective in not setting forth the nature of the defense to be interposed. (*Robertson* agt. *Russell*, 20 Hun, 243.)

That it was also defective in not

setting forth the facts and circumstances showing an examination of the plaintiff to be material and necessary. (*Id.*)

44. Sections 872-873—The court at special term has no power to grant an order for the examination of a defendant for the purpose of enabling the plaintiff to make and serve his complaint.

The right to such an examination is purely a statutory one; the mode pointed out by the statute must be followed; and by the statute (*New Code, sections 872-873*) the application must be made to, and the order granted by, a judge, not by the court.

Such an order, made by the special term, is reviewable here. (*Heishon* agt. *Knickerbocker Life Insurance Co.*, 77 N. Y., 278.)

45. Section 873—Where, upon motion for the examination of a defendant before trial, the affidavit states enough to show the materiality of the examination, other facts and conclusions stated by way of argument to show the materiality of testimony to meet alleged defenses should not, under the circumstances of this case, defeat the examination.

Where a broker or commission merchant withholds the fullest information to his customer in relation to property alleged to have been bought or sold, the right to examination before trial in an action to recover alleged profits, or to adjust unsettled accounts, should be fully accorded. (*Miller* agt. *Kent*, *ante*, 321.)

46. Section 873—An order for the examination of an adverse party before trial will not be granted where the applicant only seeks to find out what the opposite party will swear to, so as to enable him to prepare to meet and overcome it. (*Hitchcock* agt. *Van Schaick et al.*, *ante*, 472.)

47. Section 982—This section con-

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sidered as to change of venue. (*Fletcher* agt. *Cooper*, ante, 873.)

48. Section 1022—What is a decision of the court upon the trial of the whole issue of fact, so as to authorize the entry of judgment upon it within the meaning of this section. (*Weyman* agt. *The National Broadway Bank*, ante, 331.)

49. Section 1214—Judgment by default in an action for conversion, can be entered only on application to the court. Such a case falls under this section, and judgment can only be entered on application to the court, in which case the damages which were unliquidated would have been legally assessed. (*Horton* agt. *La Due*, ante, 454.)

50. Sections 1240, 1292-1323—A direction for the restitution of moneys paid upon a judgment, which has been set aside upon motion or reversed upon appeal, as authorized by the Code of Civil Procedure (*Code*, sections 1292, 1323), is in effect a judgment "for a sum of money" (sec. 1240); and is enforceable by execution.

Accordingly *held*, that an order punishing a party, as for a contempt in not complying with such a direction, was unauthorized. (*O'Gara* agt. *Kearney*, 77 N. Y., 423.)

51. Section 1278—The true sense of this section is, that one joint debtor may confess a judgment upon a joint debt so as to be enforced against his individual property, and that such confession and judgment is no bar to an action against all the joint debtors upon the same demand. (*Tripp et al.* agt. *Saunders*, ante, 379.)

52. Sections 1282, 1283-1290—A case which was not within the provisions of these sections, limiting the time within which judgments may be set aside for irregularity, or for errors of fact not arising on the trial, as it was a

special proceeding and the decision therein not a judgment. (*See Matter of City of Buffalo*, 78 N. Y., 362.)

53. Section 1290—In an action to foreclose a mortgage where the judgment was entered by default, a motion to open the same by defendants, where in the contract for the purchase they were simply to take the property subject to the mortgage, and on the trial the contract could not be found; upon the discovery of the contract, it showed defendant's non-liability for the deficiency; the motion is based upon an error of fact not arising upon the trial, and falls, therefore, within this section. (*Trustees of the Northern Dispensary of New York* agt. *Merriam et al.*, ante, 227.)

54. Section 1326—Sufficiency of surety under this section. (*Dela-mater et al.* agt. *Bryne*, ante, 71.)

55. Section 1351—Stay of proceedings upon judgment of foreclosure pending appeal to general term, discretionary. Plaintiff is not entitled as matter of right to a deficiency undertaking. (*Wilson* agt. *Grant*, ante, 350.)

56. Section 1351—The notice of entry of judgment required to be served by this section, in order to limit the time of appeal from a judgment entered upon the report of a referee, must be one coming from the prevailing party; no other party, nor the attorney representing another party, has the right to serve a notice for the prevailing party; and a notice so served will not, so far as he is concerned, set running the bar of the statute. (*Kilmer et al.* agt. *Hathorn*, 78 N. Y., 228.)

57. Sections 1356, 1357—It seems, that the distinction between proceedings instituted at special term and those commenced before a judge at chambers, is disregarded

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in this section of the Code of Civil Procedure (*In Matter of Petition of Jetter*, 78 N. Y., 601.)

58. Section 1487, subdivision 1—An action against a common carrier for loss of baggage, when founded on the breach of the carrier's legal duty, is in tort, and for an injury to property within section 549 of the Code of Civil Procedure; and if defendant recovers a judgment for costs therein, it may under section 1487, subdivision 1 of the Code of Civil Procedure, issue an execution against the plaintiff for the collection thereof. (*Catlin* agt. *Adirondack Co.*, 20 Hun, 19.)

59. Section 1405 — To obtain the lien upon the personal property of a judgment debtor given by the statute (2 R. S., 366, sec. 13; *Code of Civil Procedure*, sec. 1405), from the time an execution is delivered to a sheriff "to be executed," it is not sufficient merely to place an execution in the hands of the sheriff. (*Smith et al.* agt. *Erwin*, 77 N. Y., 466.)

60. Sections 1704-1706 — Where a defendant desires to reclaim chattels replevied he must serve upon the sheriff written notice that he requires the return thereof; and he must file an affidavit that he is the owner of the property, or that he is lawfully entitled to the possession thereof.

These conditions are *mandatory*, and the failure of a defendant to comply with them renders his counter-bond nugatory. (*Techner* agt. *Deveron*, ante, 467.)

61. Section 2437 — Under this section of the Code of Civil Procedure, it is necessary for the creditor, before he is entitled to a warrant of arrest against the judgment debtor, to establish, to the satisfaction of the judge to whom the application for the issuing of a warrant is presented, by affidavit, that there is danger that the judg-

ment debtor will leave the state or conceal himself, and there is reason to believe that he has property which he unjustly refuses to apply to the payment of the judgment.

Where the allegations in the affidavit, on which the warrant is asked are stated to be upon belief, and the fact of the defendant's having property is a mere matter of inference on the part of the plaintiff, based upon the fact that the defendant is a man of extravagant habits, living in the best of hotels, &c.:

Held, that such an affidavit is insufficient. (*Nettel* agt. *Mulford*, ante, 452.)

62. Section 2458 — In order to examine a non-resident of the county upon supplementary proceedings, it must appear that the defendant has within the city an office for the regular transaction of business in person, as contradistinguished from cases where he transacts the same through agents. (*Brown* agt. *Gump et al.*, ante, 507.)

63. Section 3169 — The failure to allege, in the language of this section, subdivision 5, that the defendant is an adult, is not material. The law will presume that he is an adult, and what is presumed need not be otherwise proved in the first instance. (*Wentzler* agt. *Ross*, ante, 397.)

64. Section 3279 — Summary proceedings to recover the possession of real property is not "such a special proceeding, instituted in a court of record," as is contemplated by this section. (*Hasler* agt. *Johnson*, ante, 432.)

COLLECTING AGENT.

See BANK.

Nidig agt. *National City Bank of Brooklyn*, ante, 10.

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COMPLAINT.

1. A subsequent separate cause of action cannot be upheld by allegations contained in a preceding one unless they are connected therewith by proper averments. (*Reiners* agt. *Brandhorst*, ante, 91.)
2. *Victory Webb, &c., Manufacturing Company* agt. *Beecher* (55 How. P. R., 193) applied. (*Id.*)
3. Where a plaintiff, in her complaint, averred that she "is the only heir at law of the deceased," and as such is entitled to certain property of the deceased, but it was not alleged that the deceased died intestate, or what issue, if any, he left him surviving, or how her claim as sole heir at law arose: *Held*, on demurrer, that the averment was a conclusion of law and not the allegation of a fact, and that, for such reason, the complaint was defective in substance. (*Id.*)
4. *Res adjudicata* has no proper application on demurrer to an amended complaint where the amendment is material and the pleading essentially different by reason of the amendment. Such amendment relieves the question from being *res adjudicata*, and the complaint is tested as to its sufficiency or insufficiency by the rules of pleading otherwise applicable. (*Clegg* agt. *American Newspaper Union*, ante, 122.)
5. Where a complaint, based upon an alleged agreement between plaintiff and defendants, omitted to set out the agreement in full, was held good on demurrer at first, but afterwards the complaint was amended voluntarily, giving the agreement in full, and the portion of the agreement omitted in the original complaint and included in the amended complaint, consists of a condition precedent to

be performed by plaintiff before any obligation of defendants arises, and the complaint so amended fails to allege performance of such condition precedent, or tender or waiver of performance:

Held, the objection based upon the absence of an averment of the performance of the condition precedent is well taken; and *res adjudicata*, though it might have been available to defendants in answer to a demurrer had the amended complaint been based upon the contract as originally set forth, is not available as the complaint stands by reason of the presence of the precedent condition not shown to have been performed. (*Id.*)

6. In an action against two defendants a complaint will not be held defective on a joint demurrer by both, put upon the ground that it does not state facts sufficient to constitute a cause of action, if it states a cause of action against either. (*Fish* agt. *Hose*, ante, 238.)
7. That there is a misjoinder of parties defendant is not a ground of demurrer. The defect of parties defendant, for which a demurrer may be interposed is a deficiency. (*Id.*)

See CORPORATIONS.

Dodge agt. *The Bradstreet Company*, ante, 104.

COMMISSIONERS OF EXCISE.

1. The laws of this state permit the granting, in the city of New York, of an ale and beer license authorizing its sale, to be drank on the premises, when the party selling is not licensed as a hotel keeper. Such licenses are in the discretion of the board of excise. (*Matter of Mundy*, ante, 359.)

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COMMISSIONERS TO ASCERTAIN DAMAGES.

1. The court should not, unless there be a palpable and manifest error committed, interfere with the findings and conclusions of a commission duly appointed by the court to ascertain the damages to the owners of property taken for the widening of a street or avenue, and to assess and apportion the same. (*Matter of Union Avenue, ante, 228.*)
2. The report considered and the objections commented upon and reasons given for the confirmation of the report. (*Id.*)

CONSTABLE'S RETURN.

See JUSTICES' COURTS.

Snyder agt. Schram, ante, 404.

CONSTITUTIONAL LAW.

1. Chapter 824 of the Laws of 1870, entitled "An act to confer additional powers upon surrogates and to authorize an examination as to the effects of deceased persons," is unconstitutional, inasmuch as sections 5 and 6 thereof are clearly unconstitutional and the act indivisible. (*Matter of Rosenthal, ante, 327.*)

CONTEMPT.

1. Where a final order has been made convicting a person of contempt and pronouncing upon him judgment of fine and imprisonment, the proceedings are, for the purposes of review, to be deemed to have been terminated. (*The People ex rel. Gilmore agt. Donahue, ante, 417.*)

See PRACTICE.

Wilcox agt. Harris, ante, 262.

2. At 9 A. M., on the 18th day of

May, 1874, one Fountain entered a judgment in his favor, in an action of ejectment brought by him against one Scudder to recover the possession of a house and lot in Elmira. A writ of possession was issued thereon to the sheriff, requiring him to deliver possession, "without delay," in pursuance of which he, accompanied by one Arnot, the assignee of Fountain's right, went to the house, told Scudder that he wanted immediate possession, refused his request for a delay, took the keys of the front and back doors and put them in his pocket, and proceeded, with his assistant, to remove Scudder's property from the house. At 1 P. M., of the same day, he was served with an order staying all proceedings upon the judgment and the writ, pending the decision of a motion for a new trial. After he had read the order he stopped the further removal of the goods, told a person in the house that she had better go out, as he was going to lock up the house, and having locked the doors went away, leaving a deputy in possession. Upon an appeal from an order adjudging the sheriff guilty of a contempt in violating the stay of proceedings, and imposing a fine upon him therefore; *held*, that Arnot, as the assignee of Fountain, was, by virtue of the judgment, entitled to take possession of the premises if he could do so peaceably. That the sheriff could take possession as his agent, and, having done so, rightfully commenced to remove the defendant's goods. (*People ex rel. Scudder agt. Cooper, 20 Hun, 486.*)

3. That when served with the order staying all further proceedings Arnot was already, by virtue of what had been done, in possession of the premises; that the sheriff was not required to turn out Arnot and reinstate Scudder in possession, and that his failure so to do did not render him guilty of a contempt. (*Id.*)

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4. In proceedings to punish for a contempt where the party has acted in good faith, and in accordance with what he believed to be his duty, only motion fees and disbursements can be taxed as costs. (*Id.*)
5. Where in an action brought by a wife, for a divorce, the husband is arrested under a commitment issued upon an order adjudging him guilty of a contempt, because of his failure to pay certain sums awarded to her for counsel fees and alimony, he is not entitled to the jail liberties upon giving the usual bond to the sheriff. (*Matter of Clark*, 20 *Hun*, 551.)
6. A direction for the restitution of moneys paid upon a judgment, which has been set aside upon motion or reversed upon appeal, as authorized by the Code of Civil Procedure (*Code*, sections 1292, 1323), is in effect a judgment "for a sum of money" (*sec.* 1240); and is enforceable by execution. (*O'Gara* agt. *Kearney*, 77 *N. Y.*, 423.)
7. Accordingly *held*, that an order punishing a party, as for a contempt in not complying with such a direction, was unauthorized. (*Id.*)
8. Punishment of attorney for contempt, when not justified; and what punishment illegal. (*See Ellis* agt. *Rice* [*Mem.*], 77 *N. Y.*, 610.)

CORPORATIONS.

1. Where, in an action against a corporation defendant sued with others, it is alleged in the complaint that the corporation combined and confederated with the other defendants to injure the plaintiff by circulating false and slanderous statements to his injury with the view of compelling him to become a subscriber to the publications of the corporation

defendants, in pursuance of which combination the slanderous words were uttered by the other defendants:

Held, upon demurrer to the complaint, that a cause of action was alleged against the corporation. (*Dodge* agt. *The Bradstreet Company*, *ante*, 104.)

COSTS.

1. Costs should not be allowed in an *ex parte* order directing defendant to file his answer. (*Edleson* agt. *Duryee*, *ante*, 326.)
2. The court of appeals, in affirming the judgment of the general term, ordering a new trial, with judgment absolute for the plaintiff, said, "with costs:"
Held, That that judgment for costs carries the general costs of the action from beginning to end, except the costs of the appeals taken by plaintiff from the order confirming the report of the referee, which were specially adjudged to the defendant, and that these costs should be offset against each other, and judgment should be entered for the plaintiff for the excess. (*Rust* agt. *Hauselt*, *ante*, 389.)
3. In summary proceedings to recover the possession of real property, a landlord being a non-resident, but owning property in the city and county of New York, cannot be required to file security for costs. (*Hasler* agt. *Johnston*, *ante*, 432.)
4. This proceeding is not "such a special proceeding instituted in a court of record" as is contemplated by section 8279 of the Code of Civil Procedure. (*Id.*)
5. Defendants who sever in their defense, and all of whom succeed are entitled to several bills of costs, unless, however, such severance be in bad faith and to increase

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costs. (*Williams* agt. *Cassady*, et al., ante, 490.)

6. Thus, if persons actually partners should sever in defending an action on a partnership liability, or if one defendant should defend by an attorney, and another by the attorney's clerk, these would be cases of bad faith. (*Id.*)

7. The defendants, R. C. and J. C., were brothers, but when sued they had no joint business relations, although they had been, at a previous time, in business together: J. C. was a non-resident, having gone from the state to avoid creditors. All the property was in the hands of R. C., the other defendant. The summons was served on J. C. by publication; there could be no personal service upon him, and there was no property subject to attachment. The retainer of R. C. is in the handwriting of the attorney for J. C. The answers are indetical, that of J. C. being copied and verified in the office of the attorney for R. C. The attorney for J. C. stated that he received a letter from J. C. about the fifteenth of April requesting him to appear. But he does not state that he had not himself previously written to J. C.:

Held, that the defendants had the right to appear by different attorneys and interpose separate defenses, and having succeeded on the trial they were entitled to separate bills of costs under section 805 of the Code as matter of law, subject, however, to the power of the court to confine them to one bill in case it should be made to appear that they had made their separate defenses collusively to enhance costs.

Held, further, that, taking all these matters into consideration, and seeing the uselessness of this severance, or perhaps of any defense by J. C., the severance of defendants was not in good faith, and they should be confined to one bill of costs. (*Id.*)

See MECHANIC'S LIEN.

McMurray agt. *Hutchesson*, ante, 210.

8. In proceedings to punish for a contempt where the party acted in good faith, and in accordance with what he believed to be his duty, only motion fees and disbursements can be taxed as costs. (*People ex rel. Scudder* agt. *Cooper*, 20 *Hun*, 486.)

9. Claims against an estate may be presented at any time after executors qualify and enter upon the discharge of their duties; and when they examine and decide upon the justice of a claim presented, although no notice to creditors has been published, the effect of their decision is the same as though the claim was presented after publication of such a notice. (*Field* agt. *Field*, 77 *N. Y.*, 294.)

10. It is not requisite therefore that a claim be presented to executors, and their refusal to refer made during the publication of notice to creditors, to entitle a plaintiff, suing upon such claim, to costs. (*Id.*)

11. Where, upon appeal from an order allowing to plaintiff costs in such an action, the question as to whether there was an offer to refer appears to have been one of fact, although this court has power to pass upon the question as an original one, the general rule acted upon by it is to adopt the finding of the court below. (*Id.*)

12. The facts that the plaintiff in such an action was allowed to amend his complaint so as to claim a larger recovery, and to prove and to recover a larger compensation for services than that stated in the claim presented to the executors, do not change the claim from that originally presented. (*Id.*)

13. Plaintiff was nonsuited; on appeal a new trial was granted, costs to

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abide event. On the second trial defendant had a verdict, and the clerk taxed costs of appeal in his favor. On appeal from order of general term, affirming an order of special term, directing a re-taxation, and disallowing costs of appeal:

Held, as the appeal was from the construction by a general term of its own order, which was in accordance with the construction of other similar orders, such interpretation would not be interfered with by this court, appeal therefore dismissed. (*Union Tr. Co. agt. Whiton*, 78 N. Y., 491.)

14. An application to enforce the liability imposed by the statute (2 R. S., 619, sec. 44), declaring an assignee of the cause of action, or one beneficially interested in the recovery, liable for the costs of an action, brought by him in the name of another, is a special proceeding; and, under the provisions of the act of 1854 (sec. 8, chap. 270, *Laws of 1854*), in reference to such proceedings, costs are allowable therein. (*Marvin agt. Marvin*, 78 N. Y., 541.)

15. Where costs were denied by the court below, on the sole ground of want of power to grant them, the court recognizing the right of the applicant to such costs, on appeal to this court:

Held, that the order be reversed and application granted. (*Id.*)

16. *It seems*, that the distinction between proceedings instituted at special term, and those commenced before a judge at chambers, is disregarded in the Code of Civil Procedure (Secs. 1356, 1357). (*In re Jetter*, 78 N. Y., 601.)

17. The provision of the act of 1859 (sec. 2, chap. 262, *Laws of 1859*), in reference to payment of costs by municipal corporations, which prescribes that no costs shall be recovered in any judgment against such a corporation, unless the

claim upon which the judgment is founded was presented for payment to the chief fiscal officer thereof before suit brought, has no application to the costs of such proceedings. (*Id.*)

18. In proceedings instituted under said act of 1858, the special term vacated the assessment with costs to the applicant, from which order no appeal was taken; costs were taxed as in an action which were struck out by the general term on appeal from an order of special term denying a motion to strike out:

Held, error; that said applicant was entitled to costs at the rate allowed for similar services in civil actions. (*Id.*)

COUNTER-CLAIM.

1. By the report of the referees, to whom this cause was referred, a judgment was recovered and duly entered in favor of the plaintiffs for \$399,203.48. An appeal was taken from this judgment by the defendants to the general term of this court who reversed said judgment and ordered a new trial, with costs to abide event. The plaintiffs appealed to the court of appeals, stipulating in such notice of appeal as follows: "And the plaintiffs hereby stipulate and consent, that if the said order hereby appealed from is affirmed, judgment absolute may and shall be rendered against the plaintiffs and appellants." The *remittitur* from the court of appeals declared that, after hearing counsel for the parties, and after due deliberation had thereon, they did order and adjudge that the order of the general term appealed from in this action to this court be and the same is hereby affirmed, and judgment rendered absolute for the defendants on stipulation, with costs. (*The People agt. Denison, ante*, 157.)

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2. An order of this court was made and entered which, after reciting the previous proceedings, says: "And the said plaintiffs having in their notice of appeal stipulated and consented that if the order appealed from should be affirmed that judgment absolute should be rendered against them, the said court of appeals having affirmed the order of the said general term, and directed judgment absolute in favor of the defendants on stipulation: ordered that the judgment of the court of appeals be and the same is hereby made the judgment of this court." Under these orders the clerk of Albany county entered a judgment against the plaintiffs and in favor of the defendants for the sum of \$95,882.45, the amount of their counter-claim, and \$6,507.14, as and for their costs in this action, amounting in the aggregate to \$101,899.59. On motion by plaintiffs to vacate the judgment for the amount of the counter-claim:

Held, first, that even prior to the act of 1876, which established a state board of audit, there was no authority either by a suit against the state, or in one instituted by it to enforce a claim against it.

Second. Since the act of 1876, creating "*a state board of audit*," it matters not whether a suit is brought against the state to recover a supposed debt, or whether it is set up in an action brought by the state by way of set-off or counter-claim, that supposed debt is within the broad words of the act, "*all private claims and accounts against the state*," and must, therefore, be submitted to the special tribunal created by it.

Third. Unless this state has authorized a set-off of an independent claim against itself in an action which it has brought, and has further authorized an affirmative judgment, the judgment in this action cannot be upheld.

Fourth. The set-off and judgment are not authorized by 3 Re-

vised Statutes (8th ed., page 860, section 18).

Fifth. If this action had been between private individuals the judgment for the counter-claim could not be upheld, as there is no judgment or order of any court warranting or directing it. (*Id.*)

3. Where an order granting a new trial to the defendants is affirmed in the court of appeals such affirmance and the direction for "judgment absolute upon the right of the appellant," without any further or other direction does not authorize the clerk of the county, in which judgment is to be entered, to include therein a demand made against the plaintiff for an independent claim, when the right thereto has never been adjudicated in his favor, and when no judgment, which has been rendered, necessarily involves its merits. (*Id.*)

See REMOVAL OF CAUSES

Clarkson et al. agt. Manson, ante, 480.

COUNTY COURT.

1. Chapter 855 of 1869, as amended by chapter 695 of 1871, empowers the boards of supervisors, on the recommendation of the county court of any county, "to correct any manifest clerical or other error in any assessment," and to refund any tax illegally or improperly assessed or levied:

Held, that the said acts authorized an application to the county court to have an assessment stricken from the roll, where there was an entire want of jurisdiction in the assessors to assess the property in question, *e. g.*, the surplus profits of a savings bank wholly invested in United States bonds. (*Matter of Ulster County Savings Bank*, 20 Hun, 481.)

2. Under the provision of the act "to extend the powers of boards

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- of supervisors," etc. (*sec. 5, chap. 855, Laws of 1869, as amended by chap. 695, Laws of 1871*), which requires the board of supervisors of a county (except New York and Kings), upon the order of the county court made on application and notice as specified, to refund to a party aggrieved "the amount collected from him of any tax illegally or improperly assessed or levied," where a tax is clearly illegal, and has been collected, the county court has power to order the board of supervisors to refund the amount so collected. (*In re N. Y. Catholic Protectory, 77 N. Y., 842.*)
3. It is not essential to the exercise of this power that the assessment shall first have been adjudged illegal by some competent tribunal. (*Id.*)
 4. Certain real estate belonging to the petitioner was assessed, a tax imposed thereon and collected. By its charter (*sec. 8, chap. 647, Laws of 1866*), its property "used for the charitable purposes of said association" is exempted from taxation. Upon application to the county court under said act for an order requiring the board of supervisors to refund said tax, the petition alleged that the land upon which the tax was imposed belonged to the petitioners, and was used for such charitable purposes. This was not controverted in any manner:
Held, that the order was properly granted. (*Id.*)
 5. An assessment upon property which is by law exempt from taxation is illegal; and in such case, a county court has power under the act of 1869 (*sec. 5, chap. 855, Laws of 1869*), extending the power of boards of supervisors, etc., to order such board to refund the amount of a tax so illegally assessed. (*Williams agt. Superv. Wayne Co., 78 N. Y., 561.*)
 6. Upon application to a county court for an order, under said act of 1869, directing the board of supervisors to refund a tax upon personal property assessed to petitioner as agent, the proof was to the effect that the property so assessed consisted of bonds and mortgages, some of which had been sent to him for collection by a non-resident of the State, the residue had been taken by him on re-investments, and had been left or deposited with him for collection:
Held (CHURCH, Ch. J., FOLGER and EARL, JJ., dissenting). that such property was exempt from taxation; and the assessors having refused to deduct it from the agent's assessment, on due application being made, and a tax having been imposed thereon and paid by him under protest, that the county court properly ordered the refunding of such tax. (*Id.*)

COUNTY JUDGE.

1. The provision of the state Constitution (*art. 6, sec. 13*), declaring that "no person shall hold the office of judge or justice of any court" after the last day of December next, after he reaches seventy years of age, applies to county judges. (*People ex rel. Joyce agt. Brundage, 78 N. Y., 403.*)
2. Said provision creates a limitation of the term of office prescribed, applicable when the incumbent attains the age specified before the expiration of a full term; in which case his term expires the last day of December succeeding his arrival at that age. (*Id.*)
3. Where, therefore, a county judge who was elected in 1873, and entered upon the duties of his office January 1, 1874, arrived at seventy years of age in November, 1878:
Held, that his term expired on the last day of December, 1878; and that defendant, who was elect-

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ed county judge at the general election in 1878, was entitled to the office. (*Id.*)

COURT OF APPEALS.

1. This court has control of its calendar, and when case is put upon motion calendar and argued it will not be stricken therefrom and put on regular calendar. (*See In re Reynolds* [Mem.], 77 N. Y., 631.)

DAMAGES.

1. Damages are recoverable in an equitable action, though the plaintiff fails to establish his right to the equitable relief sought. (*Matthews* agt. *Del. and Hud. Canal Co.*, 20 Hun, 427.)

DECISION.

1. A judge has no authority, on a written opinion delivered by a deceased judge, omitting to state separately the facts found and the conclusions of law, and not directing judgment to be entered thereupon, and which does not indicate the party to whom costs are awarded, to direct the entry of judgment upon it. (*Weyman* agt. *The National Broadway Bank*, ante, 331.)
2. Where a party dies before the "decision" is actually signed or rendered against him, in a cause tried before the court, such decision and all subsequent proceedings, including the judgment entered thereon, are void under section 765 of the Code, although an *opinion* in duplicate directing the findings of facts and conclusions of law, and giving the reasons therefor, was signed and delivered by the justice to the respective attorneys while such party was living. (*Adams* agt. *Nellis*, ante, 335.)

3. The decision intended by sections 763, 765, 1010 and 1022 of the Code is the written findings of facts and the legal conclusions with the direction for the final judgment to be entered, and which must constitute a part of the judgment roll. (*Id.*)

4. Until such a *decision* is signed and filed the cause is not removed from the authority of the trial court, but remains within its control; and although the justice may have signed and delivered his opinion stating the facts and conclusions, and the judgment that should be entered, other and different findings and conclusions may properly be made and a different judgment be directed from that stated to be proper in the opinion (*See Weyman* agt. *The National Broadway Bank*, ante, 331). (*Id.*)

DEFAULT.

1. A defendant, by not answering the complaint, does not admit that plaintiff is entitled to the relief demanded against him, but only that he is entitled to such relief as the facts properly alleged authorize. (*Argall* agt. *Pitts*, 78 N. Y., 239.)

DEFENSES.

1. In an action upon two promissory notes, the answer alleged an agreement between the parties for a valuable consideration made at the time the notes were discounted, for the extension of the time of payment for six months, by giving renewal notes for those in suit, that at the maturity of the notes, defendants tendered new notes as agreed, which plaintiff refused to accept: *Held*, that this count in the answer set up a good defense. (*N. Y. S. L. and T. Co.* agt. *Holmer*, 77 N. Y., 64.)

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2. Defendant collected an award against the state as agent of plaintiff:

Held, that he could not interpose as a defense, to an action to recover the same, that the award belonged to a third person. (*Ballou* agt. *Ballou*, 78 N. Y., 825.)

3. Where a note is given in compromise and settlement of a claim in suit, in the absence of evidence of duress, or that fraud was practiced in bringing about the compromise, or that the plaintiff knew that the claim was groundless or fictitious, it is no defense to an action upon the note, that there was a good and meritorious defense to the original claim. (*Pfeister* agt. *Weber*, 78 N. Y., 834.)

4. *It seems*, that where the facts, out of which a defense to the claim arises, were known to the party making the claim, and fraudulently concealed from and unknown to the other party at the time of the compromise, such fraud may be shown. (*Id.*)

5. It is no defense to an action upon an undertaking given by the plaintiff, in an action to recover possession of personal property, that the property is in such position that it cannot be reached; the undertaking can only be satisfied by a re-delivery of the property or by payment of the judgment. (*Harrison* agt. *Willin*, 78 N. Y., 890.)

6. In an action upon a bond given to a savings bank, defendant claimed that there was a fraudulent suppression and concealment by the persons who solicited him to sign as to the true condition of the bank. It appeared that defendant was informed, when he executed the bond, that it was to be used to give credit to the bank with the banking department, and with the public, so that it would be enabled to continue its business:

Held, that this was a sufficient

notice that the bank was in a precarious condition, and that under the circumstances, the fact that its exact condition was not disclosed was no defense; also, that as defendant had allowed the bond to be treated as an asset for three years, and the public to deal with it on that assumption until it became insolvent, he was estopped from setting up such a defense. (*Hurd* agt. *Kelly*, 78 N. Y., 588.)

DEVISEES.

See TENANTS IN COMMON.

Wright agt. *Wright*, ante, 176.

DIFFICULT AND EXTRAORDINARY.

1. The action was brought to recover \$15,000 damages claimed to have arisen from a malicious interference by the defendant, with the enjoyment and occupation of valuable premises, held by the plaintiff under a long lease; it being alleged that the defendant so disturbed the plaintiff's tenants and undertenants that the latter were obliged to abandon the premises, whereby the plaintiff lost his tenants and rents, and the premises became greatly injured, and the unexpired term of the plaintiff's lease valueless.

The complaint having been dismissed at the circuit, *held*, that the action was a difficult and extraordinary one within section 809 of the Code, and that an additional allowance of \$250 was properly made. (*Morrison* agt. *Agate*, 20 Hun, 23.)

DISCHARGE.

1. A debtor who has been imprisoned for removing and disposing of his property, with intent to defraud his creditors, is not entitled to a discharge under the

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provisions of the Revised Statutes relating to voluntary assignments. (*Coffin* agt. *Gourlay*, 20 *Hun*, 808.)

DISCOVERY AND INSPECTION.

1. The directors of a corporation which is a party to an action cannot be required to produce before trial, for the inspection of the opposite party, the books of the corporation, or to give him sworn copies of entries therein, under the provision of the Code of Civil Procedure (sec. 803), authorizing the court to compel such production or copy by "a party to an action." (*Boorman* agt. *Atl. and Pac. R. R. Co.*, 78 *N. Y.*, 599.)

2. It seems, that to authorize the production of books and papers under said provision, it must be shown that they are in the possession or under the control of the person required to produce them. (*Id.*)

DIVORCE.

1. Alimony and counsel fee will be granted to the wife in an action against her husband for divorce to annul the marriage on the ground of his physical incapacity. (*Allen* agt. *Allen*, ante, 27.)

2. The case of *Bartlett* agt. *Bartlett* (*Clark's Chy. Reps.*, p. 460) not followed. (*Id.*)

3. In an action brought by a wife to have the marriage annulled for the alleged impotency of the husband, the court is not authorized to make an order against the husband for alimony to the wife, *pendente lite*, or to provide funds to defray the expenses of the suit. This is adverse to *Allen* agt. *Allen*, ante, p. 27. (*Bloodgood* agt. *Bloodgood*, ante, 42.)

4. The provisions of the Revised Statutes as to requiring the hus-

band to pay sums necessary to carry on the suit during its pendency, are restricted to cases where the wife admits the existence of a valid marriage and seeks a divorce or separation for subsequent misconduct of the husband. (*Id.*)

5. Where the husband is plaintiff and seeks to annul the marriage, but the wife affirms its validity, she is entitled to alimony and counsel fees. (*Id.*)

6. Where the husband has stipulated to pay half the referee's fees, such stipulation will be enforced. (*Id.*)

7. Subdivision 4 of section 550 of the Code of Civil Procedure, was intended and is a substitute for the writ of *ne exeat*. (*Boucicault* agt. *Boucicault*, ante, 181.)

8. Where, in a suit by the wife against her husband for a divorce, the plaintiff shows that the defendant is about to depart from the state, with no present intention of returning, except, possibly, to pass through it, and that he is to sail for Europe within a month, to be gone indefinitely:

Held, that a case is made out in which an order of arrest may lawfully issue. As the judgment may require the performance of an act, the neglect or refusal to perform which would be punishable by the court as a contempt, the case is brought within subdivision 4 of section 550 of the Code of Civil Procedure. (*Id.*)

9. Under section 780 of the Code of Civil Procedure, in the first judicial district, a motion, which elsewhere must be made in court, may be made to a judge out of court, except for a new trial upon the merits. (*Id.*)

10. An application for an order of arrest may be lawfully made to, and properly granted by, a justice

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out of court in the first judicial district. (*Id.*)

11. Any application which elsewhere may be made in court, may here be made at any time to a judge out of court. (*Id.*)
12. An order of arrest is not irregular which prescribes the form of undertaking as directed in subdivision 1 of section 575 of the Code of Civil Procedure. (*Id.*)
13. A defendant's right to the jail liberties under section 149, is not in the least affected by such direction. If the defendant does not desire to give the bail required by the order to effect his discharge, he has a perfect right to offer the limit bond under section 149, and the sheriff would be bound to accept it. (*Id.*)
14. Where a decree of divorce has been obtained by a wife against her husband and an allowance of alimony has been made for her support and "for the support and maintenance" of her three children:
Held, that the legislature intended that the allowance to the wife should be unchanged, but that the provision for the support of the children might be altered as their circumstances changed. (*Kerr* agt. *Kerr*, ante, 255.)
15. In a suit for limited divorce on the ground of cruelty, where the defendant was ordered to pay alimony, upon which he left the state, and upon the return of precept unsatisfied an order *nisi* was made that he pay within five days or that his answer be struck out:
Held, that, on proof of default, the court had power to make an order striking out the defendant's answer, which contained a general denial, and to direct a reference to take proof as if no answer had been served. (*Walker* agt. *Walker*, ante, 476.)
16. Where, in an action for divorce on the ground of adultery, trial is had before a referee, and judgment rendered upon his report in favor of defendant, which is reversed by the general term on questions of fact and a new trial ordered, the order of general term is appealable to this court, the appellant giving the usual stipulation required by the Code of Civil Procedure (sec. 191). (*Conger* agt. *Conger*, 77 N. Y., 482.)
17. In such case, upon affirmance of the order here, judgment absolute can be rendered against the appellant upon such stipulation, as the question of adultery has been tried, and the decision of the general term and of this court is to the effect that the defendant is guilty. The judgment therefore will be based upon evidence and upon judicial determinations. (*Id.*)
18. As to whether the order is appealable, where the judgment was reversed for error of law, not involving the merits, *quære*. (*Id.*)

DOUBLE COSTS.

1. Allowed against superintendents of poor in actions against overseers of the poor. (*See Gallup* agt. *Bell*, 20 Hun, 172.)

ELECTION OF REMEDIES.

1. Where, after the goods had gone into the possession of the defendant, the plaintiff accepted from her a confession of judgment for the whole value thereof, and after the facts now alleged to show conversion of the property were known to him, he issued an execution for its enforcement and collected a part thereof:
Held, that plaintiff, by accepting the judgment and taking out and enforcing his execution, must be deemed to have made his election

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to treat the goods as the property of the defendant under a sale by himself, and he cannot afterwards change his ground to that of wrongful taking and conversion. (*Field* agt. *Bland*, ante, 85.)

EQUITY.

1. The erroneous admission of evidence cannot be disregarded where the court cannot say that such evidence did not affect the result in the case.

Quare, as to whether the doctrine that the appellate court might, in its discretion in equity cases, disregard errors in the admission of evidence, if satisfied that the findings of facts were supported by other and sufficient proof, has not been overturned by the decision of the court of appeals in *Foots* agt. *Beecher*. (*Schoonmaker* agt. *Wolford*, 20 *Hun*, 166.)

2. *Quare*, as to the right of an appellate court to disregard, in equity cases, the erroneous exclusion of evidence offered by the appellant, on the ground that the result would not have been changed had such evidence been received. (*Holcomb* agt. *Holcomb*, 20 *Hun*, 156.)

EQUITABLE LIENS.

1. An agreement was entered into in 1875 between the plaintiffs and the firm of A. Soleliac & Sons whereby the former agreed to furnish said firm with raw materials for the manufacture of silk goods, and to advance funds for the purchase thereof; which goods, when manufactured, were to be delivered to and sold by the plaintiffs, the balance of the proceeds of each sale, after deductions for commissions, insurance and advances made, to be paid to said firm. During the years 1875 to 1877, the plaintiffs advanced large sums of money to them, and the latter in turn manufactured silk

and consigned the same to plaintiffs for sale. On the 8th of September, 1877, Soleliac & Sons failed, and made a general assignment to the defendant. The latter took possession of all the stock and machinery of the debtors; among these were nineteen pieces of silk finished, and about forty-five pieces unfinished. The plaintiffs claimed to have an equitable lien thereon for the balance due them from Soleliac & Sons, which amounted to \$10,000, and thereupon brought this action to enforce the same:

Held, that the plaintiffs were not entitled to recover. The identical property or its proceeds must be traced in order to uphold the lien. (*Person*, *Harriman & Co.* agt. *Obertouffer*, ante, 389.)

2. Assuming that a valid trust was created and a lien thereby acquired, it confers a right of recovery of the subject-matter of the trust or its proceeds only; and such trust cannot be impressed upon the funds in the hands of the defendant who is general assignee for the benefit of creditors. (*Id.*)

ELECTION.

See CITIZENSHIP.

The People ex rel. O'Donnell agt. *McNally*, ante, 500.

EVIDENCE.

1. The defendant was a national bank doing business at Elmira. It was in the habit of receiving money on deposit and of issuing certificates therefor to the depositor; in some cases the certificates were issued in the name of the bank, in other cases the money was placed to the credit of its president, Van Campen, and the certificates purported to be issued by him individually, this course of business being known to, and permitted by the officers of the bank:

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Held, that the evidence was properly admitted. (*West* agt. *First National Bank*, 20 *Hun*, 408.)

2. Upon the trial one of the directors was allowed to state that he was aware of the fact that Van Campen's certificates were issued for money deposited at the bank:

Held, that the evidence was properly received, for the purpose of showing that the officers of the bank had knowledge of the course of business adopted by their employees in conducting business over the counter of the bank. (*Id.*)

3. Upon the trial of this action, brought to settle the accounts of a firm that had been engaged in running a grist-mill, it appeared that the expenses of keeping the mill-flume and dam in repair were to be borne by the parties equally. Upon the examination of the plaintiff as a witness on his own behalf, he was allowed, against the objection and exception of the defendant's counsel, to state, in answer to questions put to him, that he should think that the repairs he had caused to be made, including the labor of his employees, amounted, in each year, upon an average, to about fifty dollars, and that the repairs he had caused to be made in the last thirteen years were worth \$300:

Held, that it was error to allow the plaintiff to give an aggregate estimate as to the yearly cost of the repairs, grouping together the labor of himself and his employees and the cost of the materials used; or to give such an estimate as to the gross amount of the repairs for thirteen years. (*Chandler* agt. *Allen*, 20 *Hun*, 424.)

4. That the items of labor and the materials furnished should be proved with reasonable certainty, before any allowance could be made therefore. (*Id.*)

5. That as the evidence was material, and bore upon an important issue,

it must be presumed to have been influential with the referee, and that a new trial must therefore be ordered. (*Id.*)

6. In an action by an administrator to set aside an assignment of a mortgage made by his intestate, the next of kin, though interested in the event of the action, and claiming their rights through the plaintiff, are not prohibited, by section 829 of the Code of Civil Procedure, from testifying, in his behalf, as to what they had noticed and observed in the conduct and actions of the intestate, and as to personal transactions of his with which they had no connection, and also as to communications made by him to others in their presence without any inducement, suggestion or participation on their part. (*Holcomb* agt. *Holcomb*, 20 *Hun*, 156.)

7. *Quare*, as to the right of an appellate court to disregard, in equity cases, the erroneous exclusion of evidence offered by the appellant, on the ground that the result would not have been changed had such evidence been received. (*Id.*)

8. Although the plaintiff in an action for malicious prosecution is bound to prove that the proceedings instituted against him have been terminated by the failure of the grand jury to indict or otherwise, yet this fact, when proved, is not conclusive evidence of his innocence, and the defendant may prove that the plaintiff was in fact guilty of the crime with which he was charged. (*Barber* agt. *Gould*, 20 *Hun*, 446.)

9. In an action for malicious prosecution, proof of the actual guilt of the accused is conclusive evidence of probable cause, and if such proof be made, no action can be sustained by the said accused, however plainly malice may be shown, or however improper may have been the motives

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of the person instituting the prosecution.

Upon the trial of an action for malicious prosecution, the defendant offered to prove that, before applying for the warrant, he stated all the facts within his knowledge, touching the charge subsequently made, to one Horton, who was an attorney and counselor-at-law, and also a justice of the peace, and sought to show the advice received from him. This evidence was rejected:

Held, that the evidence was improperly rejected, and that the fact that Horton was the justice of the peace, to whom the application for the warrant was subsequently made, did not render its rejection proper. (*Turner* agt. *Dinnegar*, 20 *Hun*, 465.)

10. The accused was drinking in the complainant's saloon when one of the party gave a dollar bill to the bar-tender, who gave back the change to such person, and put the bill in the money drawer, which was left open. While the bartender was stooping down to take a bottle from under the counter the accused reached over the counter and took the bill from the drawer; he made no attempt to secrete it, and at once returned it with the remark that "it was done in fun."

Held, that these facts did not justify a conviction of petit larceny. (*Devine* agt. *People*, 20 *Hun*, 98.)

11. The minutes of the proceedings of a manufacturing corporation are admissible to show knowledge on the part of a trustee of the falsity of the report as to its capital stock. (*Pier* agt. *George*, 20 *Hun*, 210.)

12. In an action for work and labor, where the value of the service is in question, it is competent for a witness, who has heard the testimony of another witness as to the nature and extent of the services

rendered, to give an opinion as to the value of the services so testified to. (*Seymour* agt. *Hollows*, 77 *N. Y.*, 178.)

13. In an action for slander or libel, evidence of the repetition by defendant of the slanderous or libelous matter, after the commencement of the action, is incompetent. But error in the reception of such evidence cannot be based upon a general objection thereto. The specific objection should be made presenting the fact upon which the rule is based, *i. e.*, that the repetition was after the action was begun. (*Daly* agt. *Byrne*, 77 *N. Y.*, 182.)

14. Defendant published two articles accusing plaintiff of producing a play and claiming to be the author, when, in fact, it was written by another person, sent to plaintiff for examination, wrongfully retained by him, and subsequently so produced as his own. In an action for libel, plaintiff to prove malice, introduced in evidence other articles repeating the charge substantially, and also alleging that the play was taken bodily from a certain published novel. Thereupon the defendant offered to show that the play was like the novel referred to. This evidence was rejected:

Held, no error; as the resemblance of the play to the novel was not an issue in the case. (*Id.*)

15. Defendant's answer alleged the receipt by him of a letter from plaintiff's attorneys, and gave what purported to be a copy thereof; it referred to an article published in "The World" newspaper. Defendant, as a witness, testified that he had read the article referred to. The article was offered by plaintiff, and received in evidence:

Held, no error; as the article was by the terms of the letter made part of it. (*Id.*)

16. In one of the articles published

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by defendant and offered in evidence by plaintiff, reference was made to a prior article published by defendant; this was offered in evidence by the latter, and rejected.

Held, no error; it not appearing that there was anything in the article received in evidence which needed explanation from the prior one. (*Id.*)

17. The recitals in a warrant of the governor of this state for the arrest of a fugitive from the justice of another state are to be taken, at least *prima facie*, as true. (*People ex rel. Draper agt. Pinkerton*, 77 N. Y., 245.)

18. A return therefore to a writ of *habeas corpus* setting forth such a warrant, which contains recitals of facts necessary to confer authority, under the Constitution and laws of the United States, to issue it, is a sufficient justification for holding the prisoner, without producing the papers or evidence on which the governor acted. (*Id.*)

19. As to whether the warrant is conclusive, or may be met by evidence on the part of the prisoner showing that the papers presented to the governor were, in fact, defective, *quars*. (*Id.*)

20. The G. M. Life Insurance Company loaned certain moneys, for which it received the individual notes of T., defendant's cashier; the checks for the amounts loaned were made payable to the order of T., and the entries of the loans in the books of said company were as made to T.:

Held, that these were not conclusive that the loan was made to T. individually; but that it was proper to show by oral evidence that the loan was made to defendant. (*Pierson agt. At. Nat. Bank*, 77 N. Y., 304.)

21. Also, *held*, that evidence of conversations had between the officers of the company, and T., and defendant's president, both during

the transactions relating to the loan, and thereafter, in regard thereto, and in reference to collaterals given to the company therefor, was competent. (*Id.*)

22. Also, *held*, that for the purpose of rebutting any presumption arising from the form of the entries in the books of the company; it was competent to show similar entries in said books of a former loan made to defendant. (*Id.*)

23. Where a woman is indicted as a *femme sole*, and pleads to the indictment, this is *prima facie* evidence that she is unmarried. (*Seiler agt. People*, 77 N. Y., 411.)

24. In an action to recover possession of certain personal property, which plaintiff claimed under a sale from S., the defense was that the alleged sale was fraudulent as against the creditors of S. S., as a witness for plaintiff, was asked whether the sale was made for an improper purpose; also whether anything transpired between him and plaintiff, by which he gave plaintiff to understand, or by which it was understood, that the transaction was for an improper purpose or to defraud creditors. These questions were excluded under objection.

Held, no error. (*Blaut agt. Gabler*, 77 N. Y., 461.)

25. By his applications for policies of life insurance D. warranted that he was then in good health and of sound body, that he usually enjoyed good health, and that he had not during seven years previous had any severe disease. D. died within three years after the last application was made. Upon the trial of an action upon the policies issued upon such application it appeared that the death of the insured was caused by nervous apoplexy. Defendant then offered to prove what causes produced that disease; also, that death thereby is the result of some disease or

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diseases of long standing; not from any sudden cause; this was objected to and rejected.

Held, error; that the evidence rejected was competent as bearing upon the warranties. (*Edington* agt. *Alma L. Ins. Co.*, 77 N. Y., 564.)

26. A physician testified as a witness for defendant that he became acquainted with D. in the winter of 1862; that he attended him professionally during the next spring and summer, and then ceased to attend or prescribe for him professionally, but his acquaintance continued until the death of D. The witness was then asked if D. was cured when he left his hands; if in his opinion D. was in good health, of sound body, and one who usually enjoyed good health in 1867, when the first application was made, and whether in his opinion, excluding any knowledge or information obtained while treating D., and judging from his appearance from that time until 1867, D. was in good health, etc. These questions were objected to and excluded.

Held, error; that they were such as could properly be put to a physician under the provision of the statute (§ R. S., 406, sec. 78) prohibiting a physician from disclosing any information necessary to enable him to prescribe, acquired while attending upon a patient professionally. (*Id.*)

27. In an action to recover for the conversion of a stock of goods, or personal property consisting of many items, a witness who has made a list of all the items and their values, and who is able to testify that all the articles named were taken and were of the values stated, may aid his memory while testifying by such list, and may use it to enable him to state the items; after he has testified the list may be put in evidence, not as proving anything of itself, but as a detailed statement of the

items testified to. (*Howard* agt. *McDonald*, 77 N. Y., 592.)

28. The trial court may in its discretion require the witness to testify to each item separately, or may allow him to testify generally to the items and their values and receive the memorandum as the detailed result of the examination. (*Id.*)

29. The rule that where an agreement is reduced to writing, it cannot be controverted or varied by parol evidence, applies only to the parties to the agreement; one not connected in any way with the agreement may show by parol what the real transaction was. (*Brown* agt. *Thurber*, 7. N. Y., 618.)

30. The rule prohibiting the reception of parol evidence, varying or modifying a written agreement, does not apply where the original contract was verbal and entire, and a part only was reduced to writing; nor does it apply to a collateral undertaking; these facts are always open to inquiry and may be proved by parol. (*Chapin* agt. *Dobson*, 78 N. Y., 74.)

31. This action was brought for an alleged breach of an agreement in writing, by which plaintiffs agreed to furnish, and defendant to purchase, certain machines upon terms and at times specified. Defendant alleged, and was permitted to prove, under objection, a parol agreement made at the same time, and in consideration of which he executed the writing, by which plaintiffs guaranteed "that the machines should be so made that they would do the defendant's work satisfactorily," if not that plaintiffs would take them back; evidence was also given showing a breach of such guaranty. The referee found that the matters in writing and the oral guarantee constituted the contract between the parties:

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Held, that the evidence was properly received, as there was nothing on the face of the instrument to show that it was the whole agreement between the parties, and as the oral guaranty did not controvert, and was not inconsistent with the written contract; also, that it was within the province of the referee to make such finding. (*Id.*)

82. In an action upon a promissory note, the defense was in substance that defendants purchased for plaintiff, and with her money, certain United States bonds; that, she not desiring to be known as the purchaser, they were bought in a defendant's name, and left in his hands for safe keeping, the note being given as a means of insuring the delivery of the bonds when called for, or of obtaining a compensation therefor if they were withheld; and that the bonds were subsequently delivered to plaintiff's husband, who was her authorized agent. Upon the trial one of the defendants was allowed to testify to conversations with plaintiff's husband, who was then deceased, in one of which he requested witness to go and purchase the bonds in his own name. No authority had then been shown in plaintiff's husband to act for her, and the evidence was objected to on that ground; the authority was subsequently proved, and it appeared from the record that the trial court knew that this should be established before the declarations were competent:

Held, that the objection was simply to the order of proof, which is always in the discretion of the court, and so was untenable. (*Platner* agt. *Platner*, 78 N. Y., 90.)

83. Also *held*, that the testimony was relevant. (*Id.*)

84. The testimony was also objected to as in violation of the spirit of section 399 of the Code of Procedure; *held*, untenable. (*Id.*)

85. Whatever evidence is offered which will assist in knowing which party speaks the truth of the issues in an action is relevant; and when to admit it does not override other formal rules of evidence, it should be received. (*Id.*)

86. E., a witness for defendant, was permitted to testify that plaintiff's husband, prior to the giving of the note in suit, had talked with witness about the purchase of, or investment in United States bonds, this was objected to as hearsay and irrelevant:

Held, untenable; that it was not hearsay, as what was said was not given in evidence; and that it was relevant. (*Id.*)

87. One of the defendants testified that, when the bonds were given up, he asked plaintiff's husband if he had the note with him, that he said he had not, but "would bring it over or destroy it, one of the two, *same as he had done a number of times.*" The clause italicized was objected to as hearsay and irrelevant:

Held, untenable; that if intended by the witness, as the statement of a fact known to him, it was relevant; if intended as an utterance of the husband, it was part of the *res gestae*, and so competent. (*Id.*)

88. Where part of a conversation with a party to the action, or his agent, has been given in evidence by the opposite party, any other or further part of the conversation which will, in any way, explain or qualify that given, may be proved in reply; but portions of the conversation not thus connected with that proved are not made admissible. (*Id.*)

89. The price at which real estate sells upon foreclosure sale is competent evidence as to its value. (*Knickerbocker Life Ins. Co.* agt. *Nelson*, 78 N. Y., 189.)

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40. In an action by a grantee of mortgaged premises to have the mortgage canceled as paid, declarations of the mortgagor while the owner and in possession, as to payments made by him on the mortgage, are not competent as evidence against plaintiff. (*Foott agt. Beecher*, 78 N. Y., 155.)
41. One, through whom the plaintiff in such action derived title, is incompetent, under the Code of Procedure (sec. 899), to testify as to declarations made by the mortgagor, he being at the time deceased. (*Id.*)
42. The surety upon the bond of a non-resident executor is interested in the event of the accounting of his principal, within the meaning of section 899 of the Code of Procedure. (*Miller agt. Montgomery*, 78 N. Y., 282.)
43. Accordingly *held*, that such a surety was incompetent to testify, as a witness on behalf of the executor, to a personal transaction or communication between him and the deceased. (*Id.*)
44. Also *held*, that the fact that the surety was called by those objecting to the executor's account, and was examined as to other facts to which he was competent to testify, was not a waiver of their right to object to the calling out of the incompetent evidence upon cross-examination. (*Id.*)
45. Also *held*, where such incompetent evidence was given without objection, that the court had the power to strike it out on motion, proof being made, that at the time the evidence was given, the contestants were ignorant of the fact that the witness was a surety; and it appearing that no harm could come to the executor by the delay in making the objection, that it was a matter within the discretion of the trial court, with the fair exercise of which this court would not interfere. (*Id.*)
46. In an action by an administratrix defendant was called as a witness in his own behalf; on cross-examination he was asked what the consideration expressed in a deed from the deceased to him was; he answered, "\$8,000 imaginary consideration." His counsel then asked him to state the real consideration; this was objected to as calling for a transaction with the deceased, and excluded; *held*, no error. (*Ballou agt. Ballou*, 78 N. Y., 325.)
47. Having established a conspiracy, proof of the acts, admissions and declarations of any one of the conspirators in pursuance and furtherance of the criminal enterprise, and in reference thereto, is competent. But the statement of one of them as to a past transaction accompanying no act done in furtherance of, or in connection with such enterprise, is not competent against the others. (*N. Y. Guar. and Ind. Co. agt. Gleason*, 78 N. Y., 504.)
48. Accordingly *held*, error; where the wife of one of the alleged conspirators was allowed to testify to statements made to her by him as to acts done by the parties implicated. (*Id.*)
49. Also *held*, that evidence to the effect that one of the defendants had, previous to the transactions in question, been engaged in other crimes, and had harbored and associated with other criminals, was improperly received. (*Id.*)
50. Statements of a defendant, pertinent to the issues, are competent evidence against him of the facts stated; but such statements are not competent to discredit the statements of a witness for the defendants. (*Id.*)
51. It is competent upon the cross-

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examination of a witness to show that, upon a material matter, he testified differently before a grand jury from the evidence given by him. (*Id.*)

52. In an action to recover damages for the alleged negligent killing of M., plaintiff's intestate, *held*, that testimony of a witness as to what occurred after the accident was competent as part of the *res gestae*. (*Cass* agt. *N. Y. C. and H. R. R. Co.*, 78 *N. Y.*, 518.)

53. Also that evidence was competent that it was the custom of defendant to keep a flagman at the place in question. (*Id.*)

54. By the terms of the lease the tenant was to keep the premises in repair; the lease was renewed from year to year by indorsements thereon:

Held, that evidence of a verbal arrangement, prior to the last renewal, by which the landlord was to make repairs, and of the bad condition of the premises, because of failure so to do, was properly excluded. (*Nicoll* agt. *Burke*, 78 *Y.*, 580.)

55. But *held*, that a subsequent parol agreement reducing the rent for the future, which had been acted upon by the parties, was valid and obligatory. (*Id.*)

56. While parol evidence is admissible to show a mistake in a written agreement, yet to justify a reformation of the instrument on that ground, the mistake should be proved as much to the satisfaction of the court as if admitted. (*Ford* agt. *Joyce*, 78 *N. Y.*, 618.)

57. On trial of indictment for murder, where deceased was shot, a piece of paper, claimed to be the wadding of the gun was produced, and a witness who testified he was familiar with the appearance of wadding shot from a gun, was asked whether the paper had that

appearance. This was objected to as not being the subject of expert testimony. The objection was overruled, and witness answered that the paper had that appearance. The general term held this error, and reversed the judgment of conviction. The court here held the case a border one; that while ordinarily a judgment would not be reversed because of the reception of such evidence, yet, it being a capital case, they would give defendant the benefit of the doubt, and so sustained the reversal. (*See People* agt. *Manks* [Mem.], 78 *N. Y.*, 611.)

EXAMINATION OF PARTY.

1. Upon appeal from an order denying a motion to vacate a previous order, the appellate court should not listen to the objection that the order to show cause on such motion did not specify the irregularities or grounds upon which it was sought to set aside the original order, unless it appears that such objection was made in the court below. (*Miller* agt. *Kent*, *ante*, 821.)

2. Where, upon motion for the examination of a defendant before trial, the affidavit states enough to show the materiality of the examination, other facts and conclusions stated by way of argument to show the materiality of testimony to meet alleged defenses should not, under the circumstances of this case, defeat the examination. (*Id.*)

3. Where a broker or commission merchant withholds the fullest information to his customer in relation to property alleged to have been bought or sold, the right to examination before trial in an action to recover alleged profits or to adjust unsettled accounts should be fully accorded. (*Id.*)

4. In an action by the administra-

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tor of a deceased partner against the surviving partners, among other things for an accounting, the plaintiff is entitled to an order for the examination of the defendants in order to enable him to prepare a complaint, but the examination should be limited to an inquiry only into the facts necessary to be included in the complaint. (*Raymond* agt. *Brooks*, ante, 383.)

5. Where the main purpose of an examination of parties before trial, as disclosed by the affidavit on which the order for the examination was made, seemed to be designed to establish the ultimate fact of an indictable offense in which the plaintiff confesses himself guilty with the defendants:

Held, that it is not competent to compel the defendants to testify to any evidentiary fact, such as the execution of certain deeds and the like, which have a tendency to establish what might result in a criminal charge against them, or which will subject them to a penalty. (*Greensward* agt. *Union Dime Savings Institution*, ante, 399.)

6. Parties to a suit have the right to be protected from inquiries of this kind, and the proper course to be pursued is by motion to limit the examination to legitimate matters rather than by objection to the several questions as they may be propounded, or by the advice of counsel to his clients that they are shielded by the statute from answering. (*Id.*)

7. To justify an order to examine a defendant to enable a plaintiff to frame his pleading, the affidavit must make disclosure of what induced plaintiff to proceed; and the framing of a general averment is not sufficient. (*Simmons* agt. *Vanderbilt*, ante, 411.)

8. An order for the examination of an adverse party before trial will

not be granted where the applicant only seeks to find out what the opposite party will swear to, so as to enable him to prepare to meet and overcome it. (*Pitpatrick* agt. *Van Schaick et al.*, ante, 472.)

9. After the service of an amended complaint herein, and before the service of an amended answer, the defendant applied for an order requiring the plaintiff to appear and be examined before trial. The defendant's affidavit set out at length the nature of the action, the relief sought and the various matters alleged in the complaint, and alleged that the deponent was advised and believed that it was material and necessary, in the preparation of his answer, that he should be permitted to examine the plaintiff as to the allegations set forth in the complaint. The affidavit then set forth the allegations as to which the plaintiff was to be examined, but mentioned no facts tending to show such examination to be necessary or material, nor did it set forth the nature of the defense to be interposed.

Upon an appeal from an order requiring the plaintiff to appear and be examined, *held*, that the affidavit was defective in not setting forth the nature of the defense to be interposed. (*Robertson* agt. *Russell*, 20 *Hun*, 243.)

10. That it was also defective in not setting forth the facts and circumstances showing an examination of the plaintiff to be material and necessary. (*Id.*)

11. Under section 870 of the Code of Civil Procedure the plaintiff is entitled to examine the defendant for the purpose of obtaining facts necessary to enable him to frame his complaint. (*Brisbane* agt. *Brisbane*, 20 *Hun*, 48.)

12. Upon an application for an order requiring the defendant to appear

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and be examined, to enable the plaintiff to obtain facts necessary to enable him to frame his complaint, the affidavit need not state that the plaintiff intends to use the deposition upon the trial of the action. (*Id.*)

EXAMINATION AND INSPECTION OF BOOKS AND PAPERS.

1. The creditors have an absolute right to examine into the affairs of the assignors, and for that purpose to inspect their books. (*Matter of Isidor and Hein, ante, 98.*)
2. The inspection need not be made by the creditor personally. He may designate some one to make it for him, and it cannot be an objection that the person so designated is an *expert*. (*Id.*)

EXCEPTION.

1. The remarks of the court addressed to counsel on the rejection of evidence, or as to the need of delaying the trial to send for witnesses, are not the subject of exception. (*Daly agt. Byrne, 77 N. Y., 182.*)
2. An exception, as to language used in a charge, to be available, must present it in the same, or in equivalent words, embracing the substance of the charge, and presenting so clearly and distinctly the proposition enunciated by the court that there can be no doubt as to what was actually intended. (*McGinley agt. U. S. L. Ins. Co., 77 N. Y., 495.*)
3. Where the phraseology of the exception is of doubtful construction, so that it is not easy to determine what is meant, and to say that it applies to any distinct portion of the charge as made, it furnishes no ground for reversal of the judgment. (*Id.*)

4. There is no distinction between legal and equitable actions, or between actions tried by a jury or a court, in respect to the availability of exceptions taken upon the trial upon admission of incompetent evidence; in any case an error in receiving such evidence, if properly excepted to, can only be disregarded when it can be seen that it could do no harm. (*Photo agt. Beecher, 78 N. Y., 155.*)

5. In action of trespass upon lands defendant claimed to be in possession under a parol contract for the purchase, the referee found that defendant was in lawful possession:

Held, that an exception to evidence on the part of defendant, incompetent under section 399 of the Code, as to the parol contract (*the vendor having died*), was not ground for reversal, as the evidence was entirely immaterial and could not have injured. (*See Fennor agt. Johnson [Mem.], 78 N. Y., 617.*)

EXCESSIVE DAMAGES.

1. A verdict in an action for an assault and battery will not be set aside on the ground that the damages are excessive, unless it appears to be the result of prejudice or passion on the part of the jury. (*Kiff agt. Youmans, 20 Hun, 128.*)

EXECUTION.

1. An execution issued against a city marshal on a district court judgment, a transcript of which has been filed in the county clerk's office, must be returned by the sheriff to the clerk of the court of common pleas and not the clerk of the city and county of New York. (*Bartel agt. Cunningham, ante, 129.*)
2. An execution against defendant's person is not void because of the omission to direct its return within

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- sixty days; and a return by the sheriff that the defendant was discharged under an order because of such defect fell with the reversal of the order on which it was based, and the validity of the execution was not impaired thereby. (*Benedict & Burnham Manufacturing Company* agt. *Thayer*, ante, 272.)
8. A deputy sheriff levied under an execution, issued upon a judgment recovered against the present plaintiff, upon certain articles of property claimed to be exempt; at the time of making the levy he told the plaintiff's wife that he thought the property was exempt, and told the plaintiff that he would levy on it and take it away if he (plaintiff) did not forbid him; to which the plaintiff replied, "I didn't know that I could forbid you," and further said that the deputy might take it. The plaintiff was also present at the sale and made no claim that the property was exempt from execution: *Held*, that having failed to claim that the property was exempt at the time the levy was made he could not thereafter claim that such levy was unlawful and sue the sheriff to recover damages therefor. (*Turner* agt. *Borthwick*, 20 *Hun*, 119.)
4. To justify an execution against the body it must be clear from the pleadings and judgment that the action is one in which it is authorized; and upon a motion to set it aside it is competent to show the theory upon which the case was tried and decided. (*Nesfel* agt. *Lightstone*, 77 *N. Y.*, 96.)
5. To obtain the lien upon the personal property of a judgment debtor given by the statute (2 *R. S.*, 886, sec. 13; *Code of Civil Procedure*, sec. 1405), from the time an execution is delivered to a sheriff "to be executed," it is not sufficient merely to place an execution in the hands of the sheriff. (*Smith* agt. *Erwin*, 77 *N. Y.*, 466.)
6. Where an execution is delivered with directions to do nothing but to hold it for further orders, while thus held the sheriff is the agent of plaintiff, the execution is dormant, and no lien upon the property of the debtor is acquired thereby. (*Id.*)
7. This action was upon a promissory note made by defendant W., and indorsed for his accommodation by defendant E. Judgment was entered against W. by default; execution issued and delivered to the sheriff with directions not to act upon it or make any levy until further orders. During the life of the execution W. had in his open and visible possession personal property sufficient to satisfy it. When plaintiff directed a levy no property could be found: *Held*, that no lien was acquired upon the property of W. by the issuing of the execution; that plaintiffs were under no obligation to E. to secure such a lien; and that therefore the facts constituted no defense as to E. (*Id.*)
8. An action was brought by a corporation to recover possession of personal property, in which a claim for the immediate delivery of the property was made. A receiver of the corporation was subsequently appointed and was substituted as plaintiff in its stead; judgment was rendered in favor of defendant, in the usual form for a return of the property or for its value, and execution was issued thereon, which was returned unsatisfied. In an action upon the undertaking given by said plaintiff upon such claim; *held*, that defendant could not object that the execution was irregularly issued, it being against an officer of the court, and issued without leave; that if the execution was improperly issued, it could only be vacated by motion for that purpose. (*Harrison* agt. *Wilkin*, 78 *N. Y.*, 890.)

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EXECUTION AGAINST THE PERSON.

1. Where, in an action against a common carrier to recover the value of articles taken from a passenger's baggage while in the possession of the carrier, it appears from the complaint that the action is founded, not upon contract, but upon the breach of the carrier's legal duty, the action is in tort and for an injury to property within section 549 of the Code of Civil Procedure, and the defendant corporation, if it recover a judgment for costs therein, may, under subdivision 1 of section 1487 of the said Code, issue an execution against the person of the plaintiff for the collection thereof. (*Oatlin agt. Adirondack Co.*, 20 Hun, 19.)
2. Where an execution issued against the person of a judgment debtor fails to require the sheriff to return it to the proper clerk within sixty days from its receipt, the execution is not thereby rendered void, and an order allowing the plaintiff to amend the same by inserting such a direction should be granted as a matter of course. (*Benedict and Burnham Mfg. Co. agt. Thayer*, 20 Hun, 547.)
3. The remedy of a defendant held by the sheriff under an execution from which such direction is omitted is by a special motion, and not by an application for a discharge under a writ of *habeas corpus*. (*Id.*)
4. Arrest of a defendant under an order of arrest and also under an execution issued on the judgment — effect on the order of arrest of a reversal, on appeal of the judgment. (*See People ex rel. Roberts agt. Bowe*, 20 Hun, 85.)
5. On judgment in justices' court against the person — set aside where an issue joined in an action on contract, was changed by amendment to one in tort in the

absence of the defendant. (*See Gilmore agt. Barnett*, 20 Hun, 514.)

6. The court cannot release a defendant held under an execution, because of his inability to endure imprisonment — Code, section 802 is only applicable to one confined for contempt — to what diseases it is applicable. (*See Moore agt. McMahon*, 20 Hun, 44.)

EXECUTORS AND ADMINISTRATORS.

1. Where one of two executors, after letters testamentary were issued to both, petitioned the surrogate that the letters testamentary issued to him might be revoked, for reasons assigned by him, and that he be discharged from his office as executor, and such petition was granted by a decretal order of the surrogate, but in such form as not to affect the letters testamentary granted to the other executor, and the executor so discharged, afterwards, and by an instrument in writing, executed and acknowledged by him, in pursuance of the order of the surrogate, formally renounced and resigned his office as executor, and when afterwards, upon the death of the surviving executor, letters "*de bonis non*," with the will of the testator annexed, were issued to a third person by the surrogate :
Held, that upon such facts the executor so released and discharged, there being no unexecuted trust under the will remaining in him, had no standing to maintain an action for the construction of the will, and this, although he was a legatee under the will, especially when it appeared that he had assigned all his interest in the legacy. (*Trow agt. Shannon*, ante, 214.)
2. Where an executor, upon his own petition, has been released from his office as executor, and has formally renounced, he cannot, after

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- letters "*de bonis non*," with the will annexed, have been, by the surrogate, issued to another, retract his renunciation and seek to be restored (*Robertson* agt. *McGeoch*, 11 *Paige*, 640). (*Id.*)
3. Executors as trustees, the question considered. (*Id.*)
4. The surety upon the bond of a non-resident executor is interested in the event of the accounting of his principal, within the meaning of section 899 of the Code of Procedure. (*Miller* agt. *Montgomery*, 78 *N. Y.*, 282.)
5. Accordingly, *held*, that such a surety was incompetent to testify, as a witness on behalf of the executor, to a personal transaction or communication between him and the deceased. (*Id.*)
6. Also *held*, that the fact that the surety was called by those objecting to the executor's account, and was examined as to other facts to which he was competent to testify was not a waiver of their right to object to the calling out of the incompetent evidence upon cross-examination. (*Id.*)
7. Also *held*, where such incompetent evidence was given without objection, that the court had the power to strike it out on motion, proof being made that, at the time the evidence was given, the contestants were ignorant of the fact that the witness was a surety; and, it appearing that no harm could come to the executor by the delay in making the objection, that it was a matter within the discretion of the trial court, with the fair exercise of which this court would not interfere. (*Id.*)
8. A surrogate has no authority, upon the accounting of an executor, to direct him to pay a sum to his counsel for the services of the latter; charges for services rendered by an attorney to an executor, are against the executor individually, and there is no authority warranting a decree in favor of the attorney, against the estate, or against the executor as such. (*Seaman* agt. *Whitehead*, 78 *N. Y.*, 806.)
9. The allowances authorized to be made by the act of 1863, relating to proceedings in the surrogate's court (*sec. 8, chap. 862, Laws of 1863*), are to the executor himself, and allow him to charge the estate for such counsel fees as he has been obliged to pay, limited, however, by the rate prescribed by the act. (*Id.*)
10. Where a surrogate, in his decree upon the final accounting of an executor, directed the payment by him to his counsel of a sum stated; *held*, that the question, as to the jurisdiction of the surrogate to make the order, could be raised by motion before the surrogate to set aside that portion of the decree; and that an appeal lay from an order denying such motion. (*Id.*)
11. A person is not entitled to receive commissions both as executor and as trustee upon the same fund for the same time. (*Hall* agt. *Hall*, 78 *N. Y.*, 535.)

EXTRA ALLOWANCE.

1. The action was brought to recover \$15,000 damages claimed to have arisen from a malicious interference by the defendant, with the enjoyment and occupation of valuable premises, held by the plaintiff under a long lease; it being alleged that the defendant so disturbed the plaintiff's tenants and undertenants that the latter, were obliged to abandon the premises, whereby the plaintiff lost his tenants and rents, and the premises became greatly injured, and the unexpired term of the plaintiff's lease valueless.

The complaint having been dis-

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missed at the circuit, *held*, that the action was a difficult and extraordinary one within section 309 of the Code, and that an additional allowance of \$250 was properly made. (*Morrison* agt. *Agate*, 20 *Hun*, 23.)

FEES.

1. Under the judiciary act the poundage of the referee on foreclosure and sale is limited to ten dollars, and is not increased by the act of 1876 amending section 309 of the Code of Procedure. (*Birge* agt. *Ainsworth et al.*, *ante*, 473.)
2. This amendment does not give the right to such fees or poundage, but is merely a limitation of the fees or poundage allowable, the right thereto being dependent upon other statutory provisions. (*Id.*)
3. If the seventy-seventh section of the judiciary is repealed the referee is remitted to the three dollars per day under the general rule as to referees' fees. (*Id.*)

FOREIGN EXECUTORS.

1. This action was brought to recover rent due on a lease executed by one Gibson, against the defendant, as executrix of the last will and testament of the said Gibson. The defendant was appointed such executrix by the surrogate of Monmouth county, in the state of New Jersey, and, as such executrix, had taken possession of the premises so leased to the said Gibson:
Held, that the courts of this state had no jurisdiction of an action at law against a foreign executrix, and that the action could not be maintained. (*Field* agt. *Gibson*, 20 *Hun*, 274.)
2. *Quere*, as to whether if the complaint had contained appropriate

averments, the action could have been maintained as one in equity for an accounting. (*Id.*)

FOREIGN INSURANCE COMPANIES.

1. Where the defendants had issued several policies of insurance upon property located in West Troy, and had paid the two dollars upon the hundred on premiums received, but had not given the bond required by the statute (*Laws of 1876, chapter 359, which is amendatory of chapter 465 of Laws of 1875*), in an action to recover the penalty for not having given the bond as required by the statute:
Held, that, by the act of the legislature (*Laws of 1879, chapter 153*) which again amends the acts of 1875 and 1876, the right to such penalties, when the premium has been paid, is taken away, and the statute necessarily includes and covers the case of a suit already brought, as well as that of one to be brought. (*Fire Department of West Troy* agt. *Ogden*, *ante*, 21.)
2. Where a penalty has been imposed by law, the legislature has power to repeal it entirely, or to limit the cases in which it is recoverable, even though an action has been brought for its recovery. (*Id.*)

FOREIGN JUDGMENT.

1. The courts of this state recognize foreign judgments as binding here when the record shows that the courts rendering a judgment had jurisdiction of the subject and of the person of the defendant, and give full credit to such judgments by refusing to retry the matters when once determined in an action where the foreign courts had acquired jurisdiction. (*Shepard* agt. *Wright*, *ante*, 512.)

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2. But the judgment of the court of a sister state has no binding effect in this state, unless the court had jurisdiction of the subject-matter and of the person of the party sought to be affected thereby, and the want of jurisdiction renders the judgment a mere nullity here. (*Id.*)

3. Where it appeared that the defendant was served with a copy of the bill of complaint in the action in the Canada court, at the village of Westfield, in the county of Chautauqua, in the state of New York, the place of defendant's residence, where the service was made:

Held, that such service did not give the court jurisdiction of the person of the defendant. No sovereignty can extend its powers beyond its own territorial limits to subject either person or property to its judicial decision. Every exercise of authority of this sort beyond this limit is a nullity. (*Id.*)

4. A citizen of one state or country cannot be compelled to go into another state or country to litigate a civil action by means of process served in his own state or country. And a judgment obtained upon such service, where no appearance is made by the person so served, can impose no personal liability which will be recognized beyond the state in which the action originated. (*Id.*)

5. It is claimed that the defendant was a citizen of Canada, although residing in the state of New York at the time of the service upon him of the bill of complaint, and that the Canada court had jurisdiction over his person wheresoever he was served:

Held, that if the fact was as is claimed, as a resident of New York, a judgment, to be enforced against him personally elsewhere than in the country where it was

obtained, cannot be supported by such a service. (*Id.*)

FORMER ADJUDICATION.

1. In an action to recover wages under an alleged contract of employment for one year at an agreed price, payable ratably and monthly, the complaint showed that plaintiff was out of the service of defendant, and was in the hire of others a part of the alleged term. It appeared upon the trial that plaintiff had before sued the defendant for wages for a prior month; the defense therein was a denial of the hiring, other than a permission to remain temporarily to close up certain work, and that defendant left plaintiff's employment on the twentieth of the month. Judgment was given for plaintiff in that action, adjudging him to be entitled to the wages for the month:

Held, that the defendant was not barred from setting up and proving a discharge of plaintiff from his service, by the fact that it was not set up and proved in the former action. (*Weed* agt. *Burt*, 78 N. Y., 192.)

2. This action was brought by plaintiff as assignor for the benefit of creditors of J. for the alleged conversion of goods levied on by defendant R., as sheriff, by virtue of an execution against H., in favor of the other defendants. Plaintiff gave in evidence a judgment-roll in an action brought by him against J. H. and another, to determine the title to the goods. The judgment therein determined that the title to the goods was originally in H.; that she transferred them to J. as security for money loaned by him, and that by the assignment to plaintiff, he acquired J.'s interest:

Held, that said judgment established conclusively that title to the property was in plaintiff good as against the defendants in that

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action, and every person claiming under them, subsequent to judgment therein; but that an execution creditor of H. could assail the transfer to J. as fraudulent and void as to him, this not having been adjudicated in the former action; that defendants therefore were not concluded from showing that the transfer to J. was fraudulent in fact, or was fraudulent and void, because there was no change of possession, and the written transfer was not filed as a mortgage. (*Raymond* agt. *Richmond*, 78 N. Y., 351.)

FORMER SUIT PENDING.

1. A plea of a former suit pending can only be supported by showing, as matter of fact, that a former suit was pending when the second action was commenced. (*Porter* agt. *Kingsbury*, 77 N. Y., 164.)
2. Such a plea cannot be supported by proof of an unsatisfied judgment against the plaintiff in a prior unsuccessful action upon the claim, which is the subject of the second action. (*Id.*)
3. This plea was interposed in an action upon an undertaking given on appeal. It appeared that a former action had been brought, the complaint in which omitted to allege that notice of judgment had been served as required by the Code of Procedure (*old Code*, sec. 848); the complaint was demurred to and demurrer sustained because of this omission; and before the commencement of the second action the former suit had proceeded to final judgment on the demurrer, which judgment remained unsatisfied. Notice of judgment was served after the commencement of the first and prior to the second action:
Held, that the plea was not sustained; also that the former judgment was not a bar. (*Id.*)

4. Also, *held*, that an appeal brought

in the first action, after the commencement of the second, had no retroactive effect, so as to sustain the plea. (*Id.*)

GENERAL GUARDIAN.

1. An action may be maintained by a general guardian in his own name to recover a debt due to his ward. (*Hauenstein* agt. *Kull*, *ante*, 24.)
2. Where the decree of a surrogate directed an administratrix to pay to the plaintiff, as general guardian of their infants, a certain sum "for each of said infants, as the distributive shares," of each of them:
Held, upon demurrer to the complaint, in an action brought by the general guardian of one of the infants for her separate share, that the other infants were not necessary parties to the suit, and that a separate suit might be brought for each share. (*Id.*)
3. When a public officer performs a specific act in pursuance of a statute, it must be presumed to have been done for the purposes of the act, and in pleading it is sufficient to aver the performance of the act. (*Id.*)
4. Thus, where a bond given by an administratrix, was ordered by the surrogate to be assigned to the general guardian, under the statute, the presumption is, that it was directed to be assigned for the purpose of being prosecuted. (*Id.*)

GENERAL TERM.

1. A decision of the general term of the supreme court to be valid, must be concurred in by at least two justices. Where two only are present at a decision, a judgment in the case to which one of them dissents is not made effective by his assent to the entry thereof.

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(*In re Kings Co. El. R. R. Co.*, 78 N. Y., 888.)

2. A motion to confirm the report of commissioners appointed herein was heard at a general term of the supreme court, three justices being present; no decision was then made, and the general term was adjourned to a subsequent day; on that day one of the justices was not present. One of those present read an opinion in favor of confirming the report, from which the other dissented. The absent justice had sent to the chief justice a statement in writing that the report should be confirmed; there was no written concurrence by him in the opinion, and no personal consultation had been had between him and either of the other justices. A memorandum was filed the same as if all three of the justices were present, stating that the report of the commissioners was confirmed:

Held (MILLER, J., dissenting), that an order of confirmation entered thereon was unauthorized; and that a refusal of the general term to vacate the same on motion was error. (*Id.*)

HABEAS CORPUS.

1. The supreme court at chambers or a county judge has not jurisdiction to grant a writ of *habeas corpus* upon the application of a wife, living in a state of separation from her husband, respecting the custody of a minor child. *The People ex rel. Ward* agt. *Ward*, ante, 174.)
2. The writ is founded upon 8 Revised Statutes (*Banks' 6th ed.*, page 168), and the application must be made to the supreme court, and it must be not only granted by, but returnable before the supreme court. (*Id.*)
3. The restriction in the *habeas corpus* act that application for a

writ must be to a judge or officer within the county where the prisoner is detained, or an adjoining county, does not apply to the supreme court or one of its justices. (*The People ex rel. Rosenthal* agt. *Owles*, ante, 287.)

4. The plain reading of the statute is that an application may be made to the supreme court, or to one of its justices anywhere, but when it is made "to any officer who may be authorized to perform the duties of a justice of the supreme court at chambers," that officer must be or reside "within the county where the prisoner is detained," unless there "be no such officer within such county, or if he be absent, or for any cause be incapable of acting, or have refused to grant such writ." (*Id.*)
5. Where the petition fails to state the locality of the confinement it is defective. The locality of the detention should be stated so that the discretion of the court or judge, as to the place of the return of the writ, could be exercised. (*Id.*)
6. The petition is required to state "that such prisoner is not committed or detained by virtue of any process, judgment, decree or judgment specified in the preceding twenty-second section." A detention for one of the causes specified in said section should be negatived. The petition should show the party detained to be without the exception. (*Id.*)
7. The recitals in a warrant of the governor of this state for the arrest of a fugitive from the justice of another state are to be taken, at least *prima facie*, as true. (*People ex rel. Draper* agt. *Pinkerton*, 77 N. Y., 245.)
8. A return therefore to a writ of *habeas corpus* setting forth such a warrant, which contains recitals of facts necessary to confer author

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ity, under the Constitution and laws of the United States, to issue it, is a sufficient justification for holding the prisoner, without producing the papers or evidence on which the governor acted. (*Id.*)

9. As to whether the warrant is conclusive, or may be met by evidence on the part of the prisoner showing that the papers presented to the governor were, in fact, defective, *quære*. (*Id.*)

ILLEGAL TRADE.

See SUMMARY PROCEEDINGS.

Shaw agt. McCarty, ante, 487.

IMPRISONED DEBTORS.

1. Under the provisions of the act providing for the discharge of imprisoned debtors where the proceedings are had under article 6, chapter 5, part 2, title 1 of the Revised Statutes:

Held, that the proceedings of the debtor are not "just and fair" where he has removed his own property with intent to defraud his own creditors or to benefit himself or his own family, although neither he nor his family have been benefited by the act—his creditors nevertheless having been deprived of the property.

Held, also, that where the debtor has procured from the creditor, at whose suit he is imprisoned, property by fraud, even if he has spent the proceeds in any way that would be unobjectionable if they were his own, and if by loss or accident he is deprived of them, his proceedings are not "just and fair."

Held, further, that where the debtor has combined or united with others to fraudulently obtain the property of the creditor at whose suit he is imprisoned, even if such others got the proceeds of the fraud and he got none, his pro-

ceedings are not "just and fair" within the meaning of the statute. (*Matter of Roberts, ante, 136.*)

2. But, on the other hand, if the prisoner, while legally liable for the debt or the damage growing out of the fraud or tort, was yet innocent of a guilty intent, and either received none of its fruits, or properly accounts for what he got, the tort in question would be no bar to his discharge. (*Id.*)

3. In this case if the judgment against the prisoner is conclusive that he had knowledge of the fraud by which the money was procured from the plaintiff, it would be indisputable evidence that the debtor's proceedings have not been "just and fair," and would be fatal to this application for his discharge. Whether the judgment is conclusive or not as to that fact depends on whether such a finding was indispensable to plaintiff's recovery. (*Id.*)

4. If the judgment does not necessarily involve a finding that he had a fraudulent intent or guilty knowledge, the question is an open one and may be tried in this proceeding; if otherwise, then having been once litigated and determined between the plaintiff and himself, it cannot be retried, but he is bound by it no matter how onerous the consequences may be. (*Id.*)

5. An adjudication in proceedings under the fifth article of chapter 5, part 2, title 1 of the Revised Statutes, is conclusive upon any question that is determined, which subsequently arises under the sixth article of the same chapter. (*Id.*)

6. The principle of the rule as to *res adjudicata* (except in cases of mere motions incidental to an action) has no reference to the form or the object of the litigation in which the particular fact is determined

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which is thenceforth to be deemed established as between the parties to the dispute. The form or object of the prior litigation does not alter the conclusive effect of the judgment or decision. (*Id.*)

7. Where, upon the examination of the petitioner, an imprisoned debtor, in the proceedings for his discharge from imprisonment, it appears that his proceedings have not been "*just and fair*" towards a creditor under whose judgment he is imprisoned:

Held, that the petition should be denied. (*Matter of Fink, ante, 145.*)

8. *Proceedings* which are not "*just and fair*," within the meaning of the statute, explained. (*Id.*)

9. On an application to discharge a person from imprisonment in custody upon final process, what is required is that the proceedings of the debtor have been "*just and fair*" in respect to the matters that he is required to swear to in the affidavit upon presenting his petition. They relate to the inquiry whether he has made any such disposition of his property, as in the affidavit he is obliged to swear that he has not; or, in other words, whether the judge is satisfied that the statement made in his affidavit is true, in respect to which the fullest inquiry may be made by the oral examination of the prisoner, under oath, as well as the examination of his wife, or of any witnesses which the creditor has to offer. (*Matter of Fowler, ante, 148.*)

10. There is nothing in the provision of the statute which would authorize holding that a debtor cannot be discharged because he made a false or fraudulent representation as to the solvency of a person to whom credit was given by the person who has recovered a judgment for damages against the prisoner, for the injury thus sustained. (*Id.*)

11. Nor is the fact that he applied for his discharge as a bankrupt any such disposition of the property as is contemplated by the act; for whatever property he possesses, under such a proceeding, goes to his creditors (*This would seem to be adverse to Matter of Roberts, ante, 136, and Matter of Finck, ante, 145.*) (*Id.*)

IMPRISONMENT.

1. The court has no power to release a defendant held under an execution against his person, because of his inability to endure the imprisonment. (*Moore agt. McMahon, 20 Hun, 44.*)
2. Section 802 of the Code authorizing the release of a person committed for a contempt, in case of his inability "*to endure the imprisonment*," is not applicable to one who is suffering from a malarial fever, but only to one suffering from a disease in the nature of a slow wasting, a steady diminution of the vital forces, tending, unless arrested by sunlight, open air, proper exercise, or the enjoyment of freedom, to a complete destruction of his constitution, and, as a not remote consequence, death. (*Id.*)

INDICTMENT.

1. Where a statute creates a new offense, making that unlawful which was lawful before, and prescribes a particular penalty therefor, that penalty alone can be enforced; the offense is not indictable. (*People agt. Hislop, 77 N. Y., 831.*)
2. Accordingly *held*, that the offense of selling liquor to an intoxicated person created by the excise law of 1857 (*sec. 18, chap. 628, Laws of 1857*), was not indictable and punishable as a misdemeanor. (*Id.*)

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INJUNCTION.

1. Where the action was to recover damages for false representations, made by the defendants, except H., by which plaintiffs parted with a large amount of goods, and while judgment is asked against the defendants, other than H., for the amount so lost, the suit is against H. to restrain him from parting with, or disposing of, goods assigned to him, pending the action :

Held, that under a proper construction of section 604, subdivision 2, an injunction should not be granted. (*Jerome Company agt. Loeb & Co., ante, 508.*)

See TRADE-MARK.

Electro-Silicon Company agt. Trask, ante, 189.

INSURANCE.

1. The holder of a lapsed policy cannot sustain action against a company. (*Taylor agt. Charter Oak Life Insurance Company, ante, 468.*)
2. Mere suspicion of insolvency and abuse will not justify a policyholder in lapsing his policy. (*Id.*)
3. There is no trust relation between the policyholder of the mutual company and the company. (*Id.*)
4. An action in equity will not lie on such a theory. (*Id.*)
5. It is questionable whether a suit to wind up a foreign company, or to interfere with its affairs, can be maintained in this State. (*Id.*)

INSURANCE COMPANY.

See RECEIVER.

Barnes agt. Atlantic Mutual Life Insurance Company, ante, 239.

JAIL LIBERTIES.

1. Where in an action brought by a wife, for a divorce, the husband is arrested under a commitment issued upon an order adjudging him guilty of a contempt, because of his failure to pay certain sums awarded to her for counsel fees and alimony, he is not entitled to the jail liberties upon giving the usual bond to the sheriff. (*Matter of Clark, 20 Hun, 551.*)

JOINT DEBTORS.

1. The proceeding provided for by section 875 of the Code of Procedure to bind a joint debtor not originally summoned is a special statutory proceeding, and a party defendant is entitled to twenty days' notice, and this although the suit be in the marine court. (*Kernochan agt. Bland, ante, 97.*)
2. A judgment cannot be confessed by one of several joint debtors, so as to bind the debtors not joining in the confession. (*Trip et al. agt. Saunders, ante, 379.*)
3. Section 1278 of the Code of Civil Procedure considered. (*Id.*)
4. The provision of the Code of Civil Procedure (sec. 758), providing that the estate of one jointly liable with others shall not be discharged by his death, does not affect contracts entered into before its passage. The provision is not merely remedial, as it imposes, in some cases, an obligation where none existed before. (*Randall agt. Sackett, 77 N. Y., 480.*)
5. Where, therefore, after action brought against two sureties upon a joint undertaking given upon appeal prior to the passage of said Code, one of the defendants died, *held*, that his liability ceased upon his death; and that a motion to revive the action against his exec-

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utors, and to substitute them as defendants, made after said Code went into effect, was properly denied. (*Id.*)

JUDGES.

1. To exclude a judge from sitting in a cause by reason of kinship, under the provision of the Revised Statutes (2 R. S., 275, sec. 2), prohibiting him from sitting in any cause, "in which he is interested, or in which he would be excluded from being a juror by reason of consanguinity or affinity to either of the parties," such kinship must exist between him and some person who is actually a party; it is not enough that he is related to some person not a party who is, or may be interested in the cause. (*In re D. and S. M. Co.*, 77 N. Y., 101.)
2. The fact, therefore, that a stockholder in a corporation, which is a party, is a relative of a judge within the prohibited degree, does not disqualify the judge from sitting; as the stockholder, although interested, is not a party. (*Id.*)
3. Consanguinity was not a disqualification at common law; the disability rests wholly upon the statute, and cannot be extended beyond its terms. (*Id.*)
4. *It seems*, that where a judge is interested in any matter brought before him, it will be deemed a "cause" within the intent of the provision of said statute, disqualifying him because of interest. (*Id.*)
5. But the provision disqualifying, because of kinship, is only applicable to a case where there are parties adverse to each other, or where some question is to be determined between two or more parties. (*Id.*)

JUDGMENT.

1. Judgment by default in an action for conversion can be entered only on application to the court. (*Horton* agt. *La Due*, ante, 454.)
2. October 22, 1873, the plaintiff recovered a judgment against the defendant, which was docketed in Westchester county at ten A. M. the following morning. At the time of docketing the judgment the defendant was seized in fee, as a tenant in common, of certain land in said county; at four P. M. of that day a deed was placed on record, dated and purporting to have been executed in August, 1872, conveying the defendant's interest therein to his brother. Subsequently the plaintiff brought an action to have the said conveyance set aside as fraudulent. Thereafter, and while the said action was pending, the defendant having procured a discharge in bankruptcy, moved, under section 1268 of the Code of Civil Procedure, to have the said judgment canceled:
Held, that the judgment should be allowed to stand so far as was necessary for the purpose of enabling the plaintiff to enforce any lien created by it upon any real estate owned by the defendant at the time it was docketed. (*Popham* agt. *Barretto*, 20 Hun, 299.)
3. The reversal of a judgment destroys its efficacy as an estoppel. (*Smith* agt. *Frankfield*, 77 N. Y., 414.)
4. A direction for the restitution of moneys paid upon a judgment, which has been set aside upon motion or reversed upon appeal, as authorized by the Code of Civil Procedure (*Code*, secs. 1292, 1323,) is in effect a judgment "for a sum of money" (sec. 1240); and is enforceable by execution. (*O'Gara* agt. *Kearney*, 77 N. Y., 423.)
5. Accordingly *held*, that an order

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- punishing a party, as for a contempt, in not complying with such a direction, was unauthorized. (*Id.*)
6. The determination of the supreme court upon a question of vacating a judgment for a mere irregularity, based upon a rule of practice, not a positive statute, and where the party complaining has not been in any way prejudiced, is not reviewable in this court. (*Moore* agt. *Shaw*, 77 N. Y., 512.)
7. Accordingly held, that an order denying a motion to vacate a judgment for deficiency in a foreclosure suit, on the ground that the report of the referee who made the sale was not confirmed, and no application for a personal judgment against defendant made, was not reviewable here. (*Id.*)
8. On March 24, 1876, plaintiff obtained a verdict against defendant. Judgment was suspended until exceptions could be heard at general term. They were argued in November, 1876, and in May, 1877, the exceptions were overruled and judgment ordered on verdict. The defendant died after argument and before decision. Plaintiff, following the practice prescribed by the Code of Civil Procedure (*secs.* 763, 1210), entered up judgment in the names of the original parties. In March, 1879, the general term, on application of plaintiff, granted an order vacating the judgment, and directing that it be "re-entered *nunc pro tunc* as of the day when the said verdict was rendered."
- Held, error; that the case was within the said provisions of the Code, and that the general term had no power to make the order. (*Tuomy* agt. *Dunn*, 77 N. Y., 515.)
9. Such an order cannot be sustained under the common law practice. (*Id.*)
10. It seems, that if the district attorney fails to enter judgment upon an order of affirmance of a judgment in a criminal action, so that a writ of error may be brought, the defendant may require it to be done; and the court, on motion, will direct such entry. (*Highway* agt. *People*, 78 N. Y., 330.)
11. A decision of General Term of the supreme court, to be valid, must be concurred in by at least two justices. Where two only are present at a decision, a judgment in the case to which one of them dissents is not made effective by his assent to the entry thereof. (*In re Kings Co. El. R. R. Co.*, 78 N. Y., 383.)
12. After the satisfaction of a judgment in favor of plaintiff, it is within the discretion of the court to vacate it and to amend the complaint by adding new causes of action, although, by so doing, the statute of limitations is avoided. (*Hatch* agt. *Central National Bank*, 78 N. Y., 437.)
13. An order, therefore, granting such relief is not reviewable here. (*Id.*)
14. Where, upon a conviction in a criminal action, sentence is suspended, and the general term, upon *certiorari*, reverses the conviction, there is no judgment, and a writ of error on behalf of the people does not lie. (*See People* agt. *Bork*, 78 N. Y., 346.)

JUDICIAL NOTICE.

1. The court will take judicial notice that premises are within a certain judicial district, where the entire street is within the statutory boundaries of such district. (*Armstrong* agt. *Cummings*, 20 Hun, 312.)

JUDICIAL SALE.

1. A purchaser at a judicial sale will be relieved from the completion

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of his purchase and his deposits will be restored, where it appears that the contract was one which he never intended to make, and which he entered into without any fault or negligence on his part. (*Fairchild* agt. *Fairchild*, ante, 851.)

2. Where it appears that the contract to purchase was made in the full belief upon the part of the purchaser, and that such belief was just and reasonable; that the lots fronted and cornered upon Ninth avenue and Two Hundred and Fifteenth street, when in fact the lots did not so front and corner, but the front or east line of said lots is 225 feet from Ninth avenue, as laid down upon the official map, and that the value of said lots is one-third less in consequence of their location with reference to Ninth avenue:

Held, that the purchaser should be relieved from the performance of his contract. (*Id.*)

3. A purchaser at a sale, under a decree in foreclosure, has a right to expect that he will acquire a good title, and he will not be compelled to accept a deed when the title is doubtful, and a claim to the property exists, in favor of persons who are not parties to the action, which might impair the value of the real estate by casting a cloud over the title, or by subjecting the purchaser to the risk of a contest at law. (*Argall* agt. *Baynor*, 20 *Hun*, 267.)

4. A purchaser upon a partition sale has a right to require a good title, and will not be compelled to complete his purchase and accept a deed which leaves him to the uncertainty of a doubtful title, or to the hazard of a contest with other parties which will seriously affect the value of the property. (*Jordan* agt. *Poillon*, 77 *N. Y.*, 48.)

5. A court of equity may, in its discretion, set aside a sale made under

its decree, and may order a re-sale, where fraud is alleged, upon facts casting such a degree of suspicion upon the fairness of the sale as to render it, in its judgment expedient so to do, although the alleged fraud may not be clearly established. (*Fisher* agt. *Hersey*, 78 *N. Y.*, 887.)

6. An order of special term setting aside a sale under such circumstances, is reviewable at general term, but, as a general rule, where only the rights of the parties to the action are involved, no appeal lies to this court. (*Id.*)

JURISDICTION.

1. Where an action was brought against defendant, a United States marshal for the alleged conversion of certain goods, and after the plaintiff had given the proof necessary to make out a *prima facie* cause of action the case of the defendant was stated and opened, the defense being that the goods for which the plaintiff sought to recover were really the property of D. & S., a mercantile firm; that proceedings in bankruptcy had been instituted against such firm and a warrant had been duly issued out of a United States district court to the defendant, as a United States marshal, which commanded him to take the property of said firm, and by virtue thereof he had taken the property in question; evidence which consisted in part of proof tending to show that the alleged sale of the goods to the plaintiff was fraudulent and void as to the creditors of the bankrupt firm was objected to upon the ground that a United States marshal, with a warrant such as that held by the defendant, was in no position to attack a sale on the ground of fraud, as under the bankrupt law, he could only take property of the bankrupt in his possession, the title to which was undisputed,

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- citing the case of *Doyle* agt. *Sharpe* (74 N. Y., 154), on the faith of which the objection was sustained, the evidence excluded and the defendant was allowed to withdraw a juror on payment of costs and to amend his pleadings; the defendant now moved to stay the trial of this cause pending a decision upon an appeal which has been taken to the supreme court of the United States in the case of *Doyle* agt. *Sharpe*: *Held*, that, as *Doyle* agt. *Sharpe* has been treated as one foreclosing all defense to this action, and as the appeal in that case presents a grave question which may be decisive of the present action, the appeal being now pending in the United States supreme court, the decision of which tribunal must control, this action will be stayed to await the decision on such appeal. (*Dederick* agt. *Fisk*, ante, 73.)
2. A state court has jurisdiction of an action on contract brought by a resident of the state against a national bank incorporated under title 62 of the Revised Statutes of the United States located in another state. (*Robinson* agt. *National Bank of New Berne*, ante, 218.)
 3. The last clause of section 5242, United States Revised Statutes, forbidding an attachment, injunction or execution to be issued against a national bank before final judgment in any proceeding in a state court applies only to such banks as have committed or are contemplating an act of insolvency. (*Id.*)
 4. An attachment can, therefore, issue against a national bank, except under the above circumstances, from a state court as provided by the Code of Civil Procedure (*Affirming* *S. C.*, 58 *How.*, 806). (*Id.*)
 5. In an action brought to recover for services rendered to the defendant after his appointment as assignee in bankruptcy and for property converted by him. *Somde*, that even if the bankrupt's estate could be held liable for such acts of the assignee, the United States courts would, under subdivision 6 of section 711 of the United States Revised Statutes, have exclusive jurisdiction of an action to reach the assets of the bankrupt. (*Griswold* agt. *Watkins*, 20 *Hun*, 114.)
 6. The exercise of the power given by the provision of the Revised Statutes (2 R. S., 728, sec. 56), authorizing a justice of the supreme court to admit to bail a person indicted for a bailable offense, if the court having cognizance of the offense is not, at the time sitting, is not restricted to the county in which the indictment was presented; and, under that provision, one arrested upon a warrant after indictment may be admitted to bail by a justice in the county where he is arrested, although the indictment was found in another county. (*The People* agt. *Olowe*, 77 N. Y., 39.)
 7. State courts have jurisdiction of an action by an assignee in bankruptcy to set aside and have declared void a chattel mortgage executed by the bankrupt, on the ground that it constitutes a fraudulent preference within the bankrupt act, and to compel an accounting on the part of the mortgagee; it is not a matter or proceeding in bankruptcy within the meaning of section 711 of the United States Revised Statutes. (*Anseley* agt. *Patterson*, 77 N. Y., 156.)
 8. A corporation, like a natural person, may appear voluntarily by attorney; and such appearance gives jurisdiction to the same extent as if there was actual service of process. (*In re Att'y. Gen'l* agt. *Guardian Mut. L. Ins. Co.*, 77 N. Y., 272.)

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9. The regularity of the appointment of a receiver of a life insurance corporation upon petition of the attorney-general cannot be questioned collaterally by any other tribunal than the one by which he was appointed. (*Id.*)
10. The supreme court having acquired jurisdiction of proceedings for winding up the affairs of the corporation, and having appointed a receiver, has jurisdiction to stay the suit of a creditor brought to recover assets to which the receiver is entitled, in whatever court such suit may be pending. (*Id.*)
11. In proceedings by the attorney-general for the appointment of a receiver of a life insurance company, pursuant to the act of 1869, (*chap. 902, Laws of 1869*), the court has jurisdiction to permit parties interested in the administration of the assets of the corporation to appear and represent their own interests, and to be made parties to all proceedings taken by or against the receiver by which their rights may be affected. (*In re Att'y-Gen'l agt. N. Am. Ins. Co., 77 N. Y., 297.*)
12. The provision of the act of 1870 (*sec. 1, chap. 859, Laws of 1870*), in relation to the surrogate's court of the county of New York, giving to the surrogate of that county jurisdiction to issue "all lawful orders and decrees" in proceedings in said surrogate's court, and declaring that the objection of want of jurisdiction shall not be taken to said orders and decrees, except by appeal or in a proceeding before the surrogate to set aside, open or modify, was intended to place the orders and decrees of said surrogate, in respect to objections to jurisdiction, upon the same footing as the order of a court of general jurisdiction. (*Bearns agt. Gould, 77 N. Y., 455.*)
13. By the term, "lawful orders and decrees," was meant orders and decrees in cases where a surrogate's court has jurisdiction of the subject matter; and the statute applies to them the rule applicable to orders of a court of general jurisdiction, that they cannot be questioned collaterally. (*Id.*)
14. As to whether an objection that a referee appointed in any action resides, and that the trial was had out of the jurisdiction of the court, is valid under any circumstances, *quære*. (*Blake agt. L. and F. Mfg Co., 77 N. Y., 626.*)
15. The objection is untenable when the point was not raised on the trial, and it does not appear that the decision was not made in the jurisdiction. (*Id.*)
16. Jurisdiction having been once acquired over the parties and the subject matter, every presumption is in favor of the legality of the judgment. (*Id.*)
17. Under the provision of the act of 1849, in relation to courts in the city of Brooklyn (*sec. 15, chap. 125, Laws of 1849*), providing for the election of justices of the peace, "who shall have the same jurisdiction in said city that justices in towns have by law," in respect to the towns, the jurisdiction of said officers is restricted to the limits of the city. (*Geraty agt. Reid, 78 N. Y., 64.*)
18. The general language of the act of 1850 (*sec. 16, chap. 102, Laws of 1850*), giving to said justices, in addition to the jurisdiction given by the former act, "the like jurisdiction in all civil cases as is now exercised by the justices of the peace of the towns," does not impair the force of such restriction, but refers only to the powers and jurisdiction which may be exercised within the city. (*Id.*)
19. Accordingly held, that a justice of the peace of said city had no power

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to send process into adjoining towns for service; and that he acquired no jurisdiction by the service of a summons outside of the city limits. (*Id.*)

JURY.

1. While one of the defendant's cars was passing down a street, in the city of Brooklyn, a horse and wagon coming down a street at right angles with the street over which the car was moving ran into it and injured the plaintiff, a passenger therein, who brought this action to recover the damages sustained thereby. The wagon was coming at a rapid rate of speed, and could have been seen, when the car reached the line of the intersecting street, at the distance of 250 feet. There was no evidence that its rate of speed increased before the collision, which occurred just before the car reached the further side of the said street. The car might have been stopped in twelve feet:

Held, that it was error to direct a nonsuit, and that the question whether it would not have been prudent for the driver, under the circumstances, to have stopped the car should have been submitted to the jury. (*Watkins agt. Atlantic Avenue R. R. Co.*, 20 *Hun*, 237.)

JUSTICES' COURTS.

1. Where, on appeal from a justice's judgment, it is alleged as error that the constable who served the summons was not a legal officer and that his return of the service is false, it is shown by affidavits that the person serving the summons has long been acting and recognized by the public as a constable and claims to be a legal officer and authorized to act as such:

Held, that, being a *de facto* constable his official acts, so far as the public and third persons are concerned, are just as valid and

effectual as though he was an officer *de jure*, and his title and acts can only be questioned in a direct proceeding with him in which they were in issue. (*Snyder agt. Schram*, *ante*, 404.)

2. Where a justice's return on appeal shows that all the jurisdictional steps were taken necessary to a valid judgment before him; that he issued a summons which was served on the defendant by a constable personally, enough is stated to raise the presumption of the regularity as to the form of the summons and its due service. If any error occurred, it is the duty of the appellant to make it clearly appear to the court on appeal, as no presumption can be indulged in against the judgment. (*Id.*)

3. Where the justice in his return certified that he issued and delivered the summons to the constable for service on the twenty-third, and on the same day it was duly returned to him by the constable with a return of personal service, the constable in his return certifying that he served the summons on the 8d day of January, 1880. From affidavits read it appeared that the summons was duly served and returned on January twenty-third. The date of service in the constable's return is not correct, and was inserted by him by mistake in neglecting to add the figure 2 just before the figure 8:

Held, that this is not fatal to the judgment.

Held, also, that ample power exists for amending the constable's return and correcting the irregularity therein. The justice had the authority to allow the amendment before or after judgment, and the amendment may be allowed now in furtherance of justice. (*Id.*)

4. The plaintiff, on commencing an action in a justices' court, procured

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a short summons against the defendant, a non-resident, on an affidavit stating that the action was on a contract. Before the return day the parties appeared, and the plaintiff declared on contract for cattle sold, and the defendant denied the allegations of the complaint. The case was adjourned, and on the adjourned day the defendant did not appear. The plaintiff then amended the complaint, declared in tort for the conversion of the cattle, recovered a judgment, filed and docketed a transcript thereof, and issued thereon an execution against the person of the defendant:

Held, that the amendment should not have been allowed, and that the execution was properly vacated and set aside by the county court on motion. (*Gilmere* agt. *Barnett*, 20 *Hun*, 514.)

5. Upon a trial in a justices' court, the plaintiff recovered a judgment of twenty-five dollars and forty-eight cents damages and seven dollars costs, in all thirty-two dollars and forty-eight cents. Upon an appeal taken by the defendant under section 871 of the Code, the county court affirmed the judgment as to eighteen dollars damages and seven dollars costs, in all twenty-five dollars, and reversed it as to the residue:

Held, that the plaintiff was entitled to the costs of the appeal. (*Chapin* agt. *Steele*, 20 *Hun*, 448.)

JUSTICES OF THE PEACE.

1. As the state constitution (art. 6, sec. 18) provides specifically for the election of justices of the peace in the towns of the state, the legislature cannot create that office and provide for an election in a different manner than therein provided or by any other locality. (*Geraty* agt. *Reid*, 78 *N. Y.*, 64.)
2. Under the provision of the act of 1849, in relation to courts in the

city of Brooklyn (sec. 15, chap. 125, *Laws of 1849*), providing for the election of justices of the peace, "who shall have the same jurisdiction in said city that justices in towns have by law," in respect to the town, the jurisdiction of said officers is restricted to the limits of the city. (*Id.*)

3. The general language of the act of 1850 (sec. 16, chap. 102, *Laws of 1850*), giving to said justices, in addition to the jurisdiction given by the former act, "the like jurisdiction in all civil cases as is now exercised by the justices of the peace of the towns," does not impair the force of such restriction, but refers only to the powers and jurisdiction which may be exercised within the city. (*Id.*)
4. Accordingly *held*, that a justice of the peace of said city had no power to send process into adjoining towns for service; and that he acquired no jurisdiction by the service of a summons outside of the city limits. (*Id.*)

JUSTICES OF THE SUPREME COURT.

1. The exercise of the power given by the provision of the Revised Statutes (2 *R. S.*, 728, sec. 56), authorizing a justice of the supreme court to admit to bail a person indicted for a bailable offense, if the court having cognizance of the offense is not, at the time sitting, is not restricted to the county in which the indictment was presented; and, under that provision, one arrested upon a warrant after indictment may be admitted to bail by a justice in the county where he is arrested, although the indictment was found in another county. (*The People* agt. *Olews*, 77 *N. Y.*, 89.)

LACHES.

1. A second mortgagee may defend against a prior, usurious mort-

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gage. (*Union Dime Savings Institution* agt. *Clark*, ante, 842.)

2. The defense of usury is legal and is to be treated as any other defense. (*Id.*)

3. Where a second mortgagee suffered a default in the foreclosure of a first mortgage, being ignorant of the fact that the first mortgage was usurious:

Held, that upon this fact first coming to the knowledge of the second mortgagee, upon a trial between the holder of the first mortgage and the owner of the equity of redemption, the default should be opened and the defense of usury allowed to be set up by the second mortgagee.

Held, further, that the second mortgagee had not lost this right by laches. (*Id.*)

4. It is an essential element of laches or negligence that the party charged with it should have knowledge, or have failed or omitted to obtain knowledge where it was obtainable, after notice, or circumstances which should have induced an inquiry and an effort to obtain knowledge. (*Id.*)

5. A drawer of a check is not discharged by laches of holder in presenting it unless he is injured thereby. (*See Scott* agt. *Meeker*, 20 *Hun*, 163.)

LEGACIES.

See WILL.

Kerr agt. *Dougherty* ante, 44.

LIBEL

1. It is legal and proper for parties claiming rights under letters patent to publish the rights claimed by them, and to give notice and warning of prosecutions of all parties who violate the rights secured

by such patent, if done in good faith, and the courts will not restrain publication and circulation of that character. (*Croft* agt. *Richardson*, ante, 356.)

2. But where, as in this case, the publication substantially charges that plaintiffs are prosecuting a business which is an unlawful interference with the defendants' rights, and are irresponsible and hoping to make something out of it before legal proceedings are taken, and that their efforts in that direction are nefarious:

Held, that this language is quite too excessive to convey simply information that plaintiffs and their patrons have no right to make and sell the article of which they claim to be the patentees, and are liable to defendants for so claiming, and the state courts have the right and jurisdiction to restrain such publication. (*Id.*)

LIENS.

1. To obtain the lien upon the personal property of a judgment debtor given by the statute (2 *R. S.*, 866, sec. 13; *Code of Civil Procedure*, sec. 1405), from the time an execution is delivered to a sheriff "to be executed," it is not sufficient merely to place an execution in the hands of the sheriff. (*Smith* agt. *Erwin*, 77 *N. Y.*, 466.)

2. Where an execution is delivered with directions to do nothing but to hold it for further orders, while thus held the sheriff is the agent of plaintiff, the execution is dormant, and no lien upon the property of the debtor is acquired thereby. (*Id.*)

3. To authorize an action to cancel a lien upon land as a cloud upon title, the lien must be apparently valid; and must exist, under such circumstances, that it may in the future embarrass the owner or

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endanger his title. (*Townsend* agt. *Mayor, etc.*, 77 N. Y., 542.)

MALICIOUS PROSECUTION.

1. In an action for malicious prosecution, proof of the actual guilt of the accused is conclusive evidence of probable cause, and if such proof be made, no action can be sustained by the said accused, however plainly malice may be shown, or however improper may have been the motives of the person instituting the prosecution.

Upon the trial of an action for malicious prosecution, the defendant offered to prove that, before applying for the warrant, he stated all the facts within his knowledge, touching the charge subsequently made, to one Horton, who was an attorney and counselor-at-law, and also a justice of the peace, and sought to show the advice received from him. This evidence was rejected:

Held, that the evidence was improperly rejected, and that the fact that Horton was the justice of the peace, to whom the application for the warrant was subsequently made, did not render its rejection proper. (*Turner* agt. *Dinnegar*, 20 Hun, 465.)

2. Although the plaintiff in an action for malicious prosecution is bound to prove that the proceedings instituted against him have been terminated by the failure of the grand jury to indict or otherwise, yet this fact, when proved, is not conclusive evidence of his innocence, and the defendant may prove that the plaintiff was in fact guilty of the crime with which he was charged. (*Barber* agt. *Gould*, 20 Hun, 446.)

MANDAMUS.

1. Where the superintendent of incumbrances and the commissioner

of public works (who in terms are authorized to keep the streets clear of obstructions) have been applied to and requested to exercise their authority and remove these obstructions but have declined and refused so to do, a *mandamus* will issue requiring them to interpose and remove the same. (*People ex rel. O'Reilly* agt. *The Mayor, ante*, 277.)

2. Although, as a general rule, a *mandamus* will not issue where the party has another remedy, it is not universally true in relation to corporations and ministerial officers, for while they may be liable in an action for neglect of duty they may still be compelled by this writ to exercise their functions according to law. (*Id.*)

3. As to whether a statutory provision, directing a municipal corporation to employ a designated class of labor, in order that the service may be well performed, vests in the persons answering the designation a legal right to be employed, and gives them a standing to compel the municipal body by *mandamus* to employ them, *quære*. (*People ex rel. Francis* agt. *Common Council of Troy*, 78 N. Y., 88.)

4. Where the duty of selecting the persons to be employed is imposed by law upon the municipal body, and the question whether they possess the requisite qualifications is one of fact to be determined by it, no particular mode of determination being provided by law, and said body has exercised the power and made the selections, its action cannot be reviewed by *mandamus*; nor can it be compelled by that proceeding to appoint particular persons on their allegation that they in fact, and not the persons actually selected, possess the prescribed qualifications. (*Id.*)

5. A writ of *mandamus* may be addressed to subordinate judicial tribunals to compel them to exer-

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- cise their functions, but not to require them to decide in a particular way. (*Id.*)
6. This principle applies in every case, where the duty, performance of which is sought to be compelled, is in its nature judicial, or involves the exercise of judicial power, irrespective of the character of the officer or body to which the writ is addressed. (*Id.*)
7. Where a subordinate body is vested with power to determine a question of fact, the duty is judicial, and it cannot be compelled by a mandamus to decide in a particular way, however clearly it be made to appear what the decision ought to be. (*Id.*)
8. Under the provision in the charter of the city of Troy (*sec. 8, tit. 2, chap. 813, Laws of 1878*), requiring the common council "to designate, not to exceed four newspapers having the largest circulation in the city, in which the city advertising shall be done," the power to determine as matter of fact which papers have the largest circulation is vested in the common council; the court cannot determine it in the first instance, and cannot direct by mandamus the designation of any particular paper or papers. (*Id.*)
9. Under said provision the common council designated four papers, the proprietors of which acted under such appointment. The proprietors of another newspaper sought to compel, by mandamus, the designation of their paper, upon affidavits showing that said paper had a larger circulation than one or more, if not all of the designated papers. The proprietors of these papers were not made parties:
Held, that aside from the legal questions, the writ should be denied, as the appointment of the papers designated would not be vacated by any judgment herein, and if compelled to designate the relators' papers there would be five official papers instead of four, as limited by the charter; also, that a mandamus requiring the common council to meet and designate not exceeding four papers having the largest circulation, could not be granted, as the year had elapsed for which the designation should have been made. (*Id.*)
10. Although the granting or refusal of a writ of mandamus is regarded as discretionary, as distinguished from a writ of right, it is not an absolute or arbitrary discretion, but is to be exercised under, and may be regulated and controlled by legal rules; and the exercise of the discretion is reviewable here. (*People ex rel. Gas Light Co. agt. Com. Council of Syracuse, 78 N. Y., 56.*)
11. Where the writ is refused, and it appears that there is a clear legal right, and that there is no other adequate remedy, the order or judgment may be reversed. (*Id.*)
12. Where the relator has for an unreasonable time slept upon his rights, the court may refuse the writ. (*Id.*)
13. In determining what will constitute such unreasonable delay, regard should be had to circumstances justifying the delay, to the nature of the case, the relief demanded, and to the question whether the rights of defendant or other persons have been prejudiced by the delay. (*Id.*)

MANUFACTURING COMPANY.

1. In an action against the trustee of a manufacturing company, to enforce a personal liability for permitting the indebtedness of the company to exceed its capital stock, all the creditors of the company must be joined. (*Anderson agt. Speers, ante, 421.*)

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2. In such an action, an accounting will be necessary to determine who are creditors of the company and the ratable manner in which the excess should be distributed among them. (*Id.*)

MARINE COURT (NEW YORK).

1. When, during the pendency of an action in the marine court of the city of New York, the defendant dies, that court may direct the action to be revived and continued against his executors or administrators, and this notwithstanding the fact that the said court would have had no original jurisdiction against such representatives in the first instance. (*The People ex rel. Egan* agt. *Justices of the Marine Court*, ante, 413.)
2. Overruling same case in 18 Hun, 883. (*Id.*)
3. Summary proceedings under the statutes to recover the possession of lands, &c., commenced before one marine court justice may be continued before another by consent of the parties. (*People ex rel. Jackson* agt. *McAdam*, ante, 485.)

MASTER AND SERVANT.

1. Employers who construct or repair machines are not liable to their employees who are engaged in the construction or repair of a machine upon which they are ordered to make certain repairs, provided some other workman in the same shop has so carelessly done his prior part of the work of repair as to leave the machine unfit to have any additional work done upon it, and in consequence thereof the employee who undertakes to do the last work is injured. (*Murphy* agt. *Boston and Albany Railroad Company*, ante, 197.)
2. The general rule undoubtedly is that an employer who furnishes

the machine for his servant to work with is bound to provide one safe for that purpose, but when a machine which is safe has been furnished the men who operate ordinarily take upon themselves the risk of their fellow-workman's carelessness. (*Id.*)

3. When an accident occurs, not in the operation but in the construction or repair of a machine for operation, in the doing of which the party, a servant, is injured, such accident being caused by the negligence of another servant who had done a previous and different part of such work of construction or repair, the master is not then liable in damages for the injury. (*Id.*)
4. A corporation is liable to an employer for negligence or want of proper care in respect to such acts and duties as it is required to perform as master or principal, without regard to the rank or title of the agent or representative entrusted with their performance. (*McCusker* agt. *Long Island Railroad Company*, ante, 258.)
5. As to such acts the agent or representative occupies the place of the corporation, and the latter is deemed present and consequently liable for the manner in which they are performed. (*Id.*)
6. Accordingly, *held*, where an agent of defendant who was a yard-master and whose duties included the hiring and discharging of drillers as well as the making up of the trains and the distribution of cars in and about the defendant's yard and repair-shop, with knowledge of a broken bumper gave the signal which in the backing of the engine and train that followed caused the death of the plaintiff's intestate who was a driller employed by the defendant, hired by the yard-master and under his immediate supervision and control, that the defendant was

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liable (*See Murphy agt. The Boston and Albany R. R. Co., ante, 197.*) (*Id.*)

MECHANICS' LIEN.

1. A subcontractor filing a lien, after an assignment, for the benefit of creditors by his contractor is entitled to judgment against the owner, contractor, and his assignee for the foreclosure of the lien, and is not compelled to share in the general fund in the hands of the assignee as an ordinary creditor. And where the assignee of the contractor has paid the amount of the lien to the county clerk, and the lien has thus been discharged, the amount so deposited is in lieu of the property, and the lienor upon bringing his proper action is entitled to judgment for the payment to him of the money so deposited. (*McMurray agt. Hutcheson, ante, 210.*)
2. The mechanics' lien laws of 1875, as amended in 1879, are not different in these respects from the former mechanics' lien laws of 1830 and 1851 under which the courts have made decisions on this subject. (*Id.*)
3. The costs in such an action must be paid out of the contractor's estate, before any claims owing by Jennings have been satisfied (*Id.*)
4. Plaintiff furnished G. H. Z. certain lumber which he purchased for the purpose of building fences and other structures in his coal yard on Avenue D, in the city of New York. G. H. Z. agreed to pay cash for the lumber, but after all the lumber was furnished and used for the purpose intended, but before it was all paid for, G. H. Z. died, intestate, and the defendants, K. W. Z. and J. D. K. C., were appointed administrators. Thereafter, and before the expiration of thirty days from the time

of the furnishing of the lumber, the plaintiff filed a notice of claim or mechanic's lien, and thereafter commenced an action to foreclose the same. The defendants demurred to the complaint on the ground that it did not show a sufficient cause of action, G. H. Z. having died before the lien was filed :

Held, that the lien had attached before the death of the owner, and the estate subject to the lien, and estate for years, passed to the administrators of the owner as part of the assets of the intestate. The administrators are liable for the deficiency, if any there should be, and the other defendants, who purchased the estate subject to the lien, are necessary parties to the foreclosure. (*Brown agt. Zeiss, ante, 345.*)

5. The provisions of the mechanics' lien law for the county of Westchester, &c. (*chap. 402, Laws of 1854, as amended by chap. 489, Laws of 1873*), giving a lien to persons furnishing materials whenever the owner of land consents to the erection of a building thereon, apply where the owner is a married woman. (*Husted agt. Mathes, 77 N. Y., 388.*)
6. As to such land the owner is to be regarded, under said act, as though unmarried; and her consent may be implied from her knowledge, and the absence of any objection on her part. (*Id.*)
7. Under the provision of the mechanics' lien law for the county of Kings (*sec. 8, chap. 478, Laws of 1862*), which provides that "every lien created under this act shall continue until the expiration of one year from the creation thereof, and until judgment rendered in any proceedings for the enforcement thereof," a lien so created continues for one year, and if proceedings to enforce it are commenced within that time, and are pending at the end thereof, then

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the lien continues until judgment.
(*For* agt. *Kidd*, 77 N. Y., 489.)

8. Where, therefore, in an action to foreclose a lien, brought within the year, judgment was rendered for defendant, which was reversed upon appeal and judgment rendered for plaintiff after the expiration of the year, *held*, that the lien had not ceased to exist when such judgment was rendered. (*Id.*)

9. Under the provision of said act (sec. 9) providing that the proceeds of sale under a lien "shall be applied to the payment of the costs of the action and proceedings, and of the amount found to be due to the claimant," &c., all costs before judgment must be paid out of the proceeds of sale, and cannot properly be directed to be paid by the owner of the land. (*Id.*)

10. Defendant's answer put in issue most of the material allegations of the complaint. Upon reversal of judgment in his favor the general term directed judgment absolute for plaintiffs:

Held, error; that a new trial should have been granted. (*Id.*)

11. The mechanics' lien law of 1862, for the counties of Kings and Queens (*chap.* 478, *Laws of 1862*), was intended for the protection of those who perform labor or furnish materials within this State; it has no extra territorial effect. (*Birm. Iron F. Co.* agt. *G. C. Starch Co.*, 78 N. Y., 80.)

12. Where, therefore, a steam engine was purchased by, and delivered to, defendant in the State of Connecticut, which was placed in its factory in the county of Queens; *held*, that plaintiff, who furnished to the vendor the bed-plate of the engine, could acquire no lien under said statute upon defendant's premises. (*Id.*)

13. As to whether such an engine is "an improvement upon lands"

within the meaning of the statute, *quare*. (*Id.*)

MISDESCRIPTION.

See JUDICIAL SALE.

Fairchild agt. *Fairchild*, *ante*, 357.

MOTIONS AND ORDERS.

1. A person obtaining a void order cannot use it to excuse the laches caused by trusting to it. (*Peck* agt. *New York and New Jersey Railway Company*, *ante*, 419.)

2. An order vacating an order is a judicial authority that it should not have been granted. (*Id.*)

See PRACTICE.

Matter of Braks, *ante*, 329.

3. *It seems*, that if the remarks of the court are so adverse to one of the parties as to call for the interference of a court of review, on the ground that the verdict has been improperly influenced, the mode of review is not by exception, but the question should be brought up on motion to set aside the verdict. (*Daly* agt. *Byrne*, 77 N. Y., 182.)

4. A motion at special term to set aside or strike out an amendment of a pleading made by a referee on trial is improper. (*Quimby* agt. *Craftin*, 77 N. Y., 270.)

5. *It seems*, that the proper mode of reviewing the decision of the referee is by exception thereto and appeal from the judgment. (*Id.*)

6. An order denying a motion for leave to serve an amended complaint is not appealable to this court. (*Id.*)

7. The court at special term has no power to grant an order for the examination of a defendant for the

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- purpose of enabling the plaintiff to make and serve his complaint. (*Heishon* agt. *Knicker. L. Ins. Co.*, 77 N. Y., 278.)
8. The right to such an examination is purely a statutory one; the mode pointed out by the statute must be followed; and by the statute (*new Code*, secs. 872, 873) the application must be made to, and the order granted by, a judge, not by the court. (*Id.*)
9. Such an order, made by the special term, is reviewable here. (*Id.*)
10. The determination of the supreme court upon a question of vacating a judgment for a mere irregularity, based upon a rule of practice, not a positive statute, and where the party complaining has not been in any way prejudiced, is not reviewable in this court. (*Moore* agt. *Shaw*, 77 N. Y., 512.)
11. Accordingly *held*, that an order denying a motion to vacate a judgment for deficiency in a foreclosure suit, on the ground that the report of the referee who made the sale was not confirmed, and no application for a personal judgment against defendant made, was not reviewable here. (*Id.*)
12. An order vacating and setting aside an *ex parte* order discharging an assignee for the benefit of creditors, and his sureties, from all liability to the creditors, and canceling his bond, is in the discretion of the court, and is not reviewable here. (*In re Horafalls*, 77 N. Y., 514.)
13. Such an order also is not appealable, as it is not a final order within the provision of the Code of Civil Procedure (*sub. 8, sec. 190*), regulating appeals to this court. (*Id.*)
14. The question whether the moving creditor has such an interest as authorized him to make the motion cannot be reviewed on appeal from such an order. (*Id.*)
15. On March 24, 1876, plaintiff obtained a verdict against defendant. Judgment was suspended until exceptions could be heard at general term. They were argued in November, 1876, and in May, 1877, the exceptions were overruled and judgment ordered on verdict. The defendant died after argument and before decision. Plaintiff, following the practice prescribed by the Code of Civil Procedure (secs. 763, 1210), entered up judgment in the names of the original parties. In March, 1879, the general term, on application of plaintiff, granted an order vacating the judgment, and directing that it be "re-entered *nunc pro tunc* as of the day when the said verdict was rendered." *Held*, error; that the case was within the said provisions of the Code, and that the general term had no power to make the order. (*Tuomy* agt. *Dunn*, 77 N. Y., 515.)
16. An order of the general term granting a new trial, in a case tried by a jury, where the facts were before the general term, and it had the power to grant a new trial thereon, is not appealable. (*Snebley* agt. *Connor*, 78 N. Y., 218.)
17. Upon appeal from such an order, *held*, that as the practice in such cases had become thoroughly established and known, the order should be affirmed in accordance with the stipulation in the notice of appeal, instead of dismissing the appeal. (*Id.*)
18. Where a surrogate, in his decree upon the final accounting of an executor, directed the payment by him to his counsel of a sum stated; *held*, that the question as to the jurisdiction of the surrogate to make the order, could be raised by motion before the surrogate to set aside that portion of the decree; and that an appeal lay from

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- an order denying such motion. (*Seaman* agt. *Whitehead*, 78 N. Y., 806.)
19. An order of a general term of the supreme court, affirming a judgment of a court of sessions, upon conviction, is not reviewable in this court on writ of error. (*Highmy* agt. *People*, 78 N. Y., 330.)
20. *It seems*, that if the district attorney fails to enter judgment upon an order of affirmance, so that a writ of error may be brought, the defendant may require it to be done; and the court, on motion, will direct such entry. (*Id.*)
21. A motion to confirm the report of commissioners appointed herein was heard at a general term of the supreme court, three justices being present; no decision was then made, and the general term was adjourned to a subsequent day; on that day one of the justices was not present. One of those present read an opinion in favor of confirming the report, from which the other dissented. The absent justice had sent to the chief justice a statement in writing that the report should be confirmed; there was no written concurrence by him in the opinion, and no personal consultation had been had between him and either of the other justices. A memorandum was filed the same as if all three of the justices were present, stating that the report of the commissioners was confirmed: *Held* (MILLER, J., dissenting), that an order of confirmation entered thereon was unauthorized; and that a refusal of the general term to vacate the same, on motion, was error. (*In re Kings Co. El. R. R.*, 78 N. Y., 883.)
22. Defendant's attorney having served an offer of judgment signed by him to which no affidavit of authority was attached as required by the Code of Civil Procedure (sec. 740), and plaintiff on the trial having recovered less than the amount named, said attorney moved to be allowed to serve the affidavit *nunc pro tunc*, and for an extra allowance. The motion was denied: *Held*, that if such an amendment was authorized, it was in the discretion of the court, and an order denying the application therefor was not reviewable here; and that as the question of costs could not arise until this relief was obtained, the decision of the motion did not determine the right to costs, and so was not appealable on that account. (*Riggs* agt. *Waydell*, 78 N. Y., 586.)
23. Where a receiver has been appointed in proceedings supplementary to execution instituted in favor of one judgment creditor, in an action brought by another judgment creditor, to set aside such proceedings on the ground of collusion, it is in the discretion of the court to appoint another receiver, and to direct the first receiver to hand over to him the property received. (*Connolly* agt. *Kretz*, 78 N. Y., 620.)
24. An order, therefore, making such appointment and giving such direction, is not reviewable here. (*Id.*)
25. From a surrogate's decree made in 1867, on the accounting of an administrator, the latter appealed; the petition of appeal specified certain portions of the decree as erroneous. The general term made an order in February, 1871, which the contestant claimed reversed the whole decree. The latter made a motion at general term, in June, 1878: 1st. For leave to renew a former motion. 2d. To amend or modify the general term order. This motion was denied: *Held*, that the order was not reviewable here; that if the order of 1871 was erroneous and reviewable, an appeal should have been

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taken therefrom; if irregular, the attention of the court should sooner have been called to it; but, in any view, it was a matter within the discretion of the supreme court. (*Bentley* agt. *Waterman*, 78 N. Y., 628.)

26. When order allowing *cestuis que trust* to appeal from judgment properly granted *ex parte*. (See *Rockes* agt. *Hathorn*, 78 N. Y., 222.)

27. When order as to disposition of funds in hands of receiver appointed in a foreclosure suit, is in discretion of court and not reviewable here. (See *Embury* agt. *Foster* [Mem.], 78 N. Y., 624.)

MORTGAGE.

1. Where a person has taken a conveyance of a burial lot, and has made interments therein of the dead of his family, it is in such condition that it cannot be mortgaged to secure the payment of a debt or the return of money borrowed. (*Thompson* agt. *Hickey*, ante, 434.)

MORTGAGE FORECLOSURE.

1. In an action to foreclose a mortgage, the bond accompanying the mortgage being executed by a person other than the mortgagors as well as by the mortgagors, it is proper to make such obligor a party to the action and to demand against all the obligors a judgment for any deficiency. (*Thorne* agt. *Newby*, ante, 120.)

2. The objection that an action "*in personam*" at law is united with a claim "*in rem*" in equity is not well taken (2 R. S., p. 191, sec. 154; *Scotfield* agt. *Doscher*, 72 N. Y., 491). (*Id.*)

3. In a foreclosure suit judgment for a deficiency was entered against

parties upon a covenant in the deed given them upon the purchase of the property, whereby they assumed the payment of the mortgage. In the contract for the purchase they were simply to take the property subject to the mortgage. When they were made parties to the foreclosure suit they were unable to find the contract, and did not, until some time after judgment, discover that by the deed they were made to assume the mortgage, the instrument having been drawn without their inspection; they, therefore, allowed the foreclosure suit to go by default:

Held, that when the contract was discovered, it being within ten years after the judgment was entered, the defendants were entitled to ask that the judgment be opened and they be allowed to come in and defend. (*Trustees of the Northern Dispensary of New York* agt. *Merriam et al.*, ante, 226.)

4. As, by the terms of the contract, defendants were not to assume the mortgage the covenant which imposed the liability upon them was a mutual mistake between the parties thereto; and when the discovery of the contract showed defendants' non-liability for the deficiency they then had the right to resist responsibility which they had unknowingly assumed. (*Id.*)

5. A second mortgagee may defend against a prior, usurious mortgage. (*Union Dime Savings Institution* agt. *Clark*, ante, 342.)

6. The defense of usury is legal and is to be treated as any other defense. (*Id.*)

7. Where a second mortgagee suffered a default in the foreclosure of a first mortgage, being ignorant of the fact that the first mortgage was usurious:

Held, that upon this fact first coming to the knowledge of the

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second mortgagee, upon a trial between the holder of the first mortgage and the owner of the equity of redemption, the default should be opened and the defense of usury allowed to be set up by the second mortgagee:

Held, further, that the second mortgagee had not lost this right by laches. (*Id.*)

8. It is an essential element of laches or negligence that the party charged with it should have knowledge, or have failed or omitted to obtain knowledge where it was obtainable, after notice, or circumstances which should have induced an inquiry and an effort to obtain knowledge. (*Id.*)

9. Where, in a foreclosure of a railway mortgage, bonds are outstanding and pledged as collateral, it is not error for the referee to compute, to include them in his estimate of the amount due. (*Peck* agt. *New York and New Jersey Railway Company*, ante, 419.)

10. A person obtaining a void order cannot use it to excuse the laches caused by trusting to it. (*Id.*)

11. An order vacating an order is a judicial authority that it should not have been granted. (*Id.*)

12. In 1856 one Howell purchased certain lands upon which there were then two mortgages, one for \$5,500, and the other for \$1,800. The payment of the first mortgage was assumed by Howell in his deed, but no reference was made therein to the second. In 1857 the second mortgage was foreclosed, the summons being served on Howell by publication. Upon the sale the owner of the second mortgage purchased and took possession of the land, paid taxes, and subsequently satisfied the first mortgage. Thereafter the premises were conveyed to various persons, and finally by a deed; with

covenants of warranty, &c., to the defendant Clara B. Leavitt, a married woman, who bought them subject to a \$15,000 mortgage given by one of her grantors, of which she assumed the payment:

Held, that she was in possession of the premises as a mortgagee in possession. (*Dunning* agt. *Fisher*, 20 *Hun*, 178.)

13. That being so in possession, the heirs of the mortgagor could not maintain ejectment against her. That the evidence as to the action of ejectment was to be entirely disregarded in the present action. (*Id.*)

14. That her right to sue on the covenants of title, contained in the deed from her grantor, was sufficient to uphold her covenant to pay the mortgage. (*Id.*)

15. In an action of foreclosure brought by the plaintiff, the holder of a second mortgage upon a leasehold estate, he was, with the consent of the mortgagors, appointed a receiver and directed to collect the rents of the premises, and "out of the same to keep said buildings insured against loss or damage by fire, and in repair, and to pay the ground rent and taxes" Subsequently one Maas, the owner of the first mortgage, commenced an action for its foreclosure, to which the plaintiff herein was made a defendant, and upon a sale had under a judgment recovered therein, Maas purchased the premises for less than the amount due on his mortgage. Upon the passage of the accounts of the plaintiff as receiver, it appeared that he had refused to pay the ground rent and taxes due and accruing upon the premises while he was collecting the rents, and claimed to be entitled to apply them upon his own mortgage:

Held, that he was bound to apply the rents received by him in paying such ground rent and taxes, and that as Maas had been com-

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pelled to pay the same, to save the property, the receiver should be ordered to pay over any balance in his hands to Maas to apply thereon. (*Ranney* agt. *Poyser*, 20 *Hun*, 11.)

16. Where a receiver will not be allowed to charge against the fund fees paid to counsel, considered. (*Id.*)

17. The defendant purchased certain premises at a sale had under a foreclosure by advertisement of a second mortgage, of which he was then the owner. By the terms of sale, which were read by the auctioneer, the premises were to be sold free of all incumbrances, the purchaser being required to pay the first mortgage out of the amount bid by him, and to pay over the balance of his bid to the auctioneer. These terms of sale were not contained in the notices of the foreclosure which were served and posted as required by the statute. The purchaser paid off the first mortgage, paid the balance of his bid to the auctioneer, and received the affidavits of sale as provided by the statute.

Subsequently the plaintiff, who had been appointed receiver of the property of the mortgagor and owner of the equity of redemption, brought this action to recover a surplus alleged to have arisen on such sale, claiming that the defendant was not entitled to be allowed the amount he had paid on the first mortgage, because the owner of the equity of redemption, who was not present at the sale, had no knowledge of the terms of sale or of such payment, and had never ratified them, and that, therefore the purchaser must account for the amount of his bid, less the amount due on the second mortgage:

Held, that the action could not be maintained. (*Story* agt. *Hamilton*, 20 *Hun*, 183.)

18. Where a plaintiff has, without

first obtaining leave from the court, brought an action at law to recover a deficiency arising on the sale of certain premises under a decree of foreclosure entered in a former action, the court may, upon his application, and upon such terms as are just, grant him leave "to bring and continue" the action without prejudice to the proceedings already had. (*Earle* agt. *David*, 20 *Hun*, 527.)

19. An order denying a motion to vacate a judgment for deficiency in a foreclosure suit, on the ground that the report of the referee who made the sale was not confirmed, and no application for a personal judgment against defendant made, is not reviewable here. (*Moore* agt. *Shaw*, 77 *N. Y.*, 512.)

20. In an action to foreclose a mortgage the complaint alleged the conveyance of the mortgaged premises to defendant D., subject to the mortgage and taxes; that D. entered into possession and collected the rents and profits; and asked judgment that if the proceeds of sale are insufficient to pay taxes, and the amount due for principal and interest after deducting costs and expenses, that D., to the extent of the rents collected by him be adjudged to pay the deficiency. D. did not appear in the action, and judgment was entered adjudging that, in case of deficiency it be referred to a referee to take an account of the rents collected by D., and that to the extent of such collections D. pay to plaintiff the unpaid taxes and assessments, and the amount due for interest on the mortgage, or so much thereof as shall satisfy the deficiency. A deficiency having occurred, the referee took the account and reported the amount of rents received by D. A motion to confirm the report, and for judgment and execution against D., was thereupon made, which was denied. It did not appear that D. was served with any of the

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papers after service of summons and complaint, or with notice of any subsequent proceedings. Plaintiff appealed without service upon D. of notice of appeal to the general term, or to this court:

Held, that the motion was properly denied. (*Argall* agt. *Pitts*, 78 N. Y., 280.)

21. *It seems*, that in such case the order appealed from would not be reversed without, at least, requiring the service of notice of appeal on the defendant sought to be affected. (*Id.*)

22. D., who had executed a mortgage upon certain premises to secure his bond, conveyed the premises, subject to the mortgage, which the grantee assumed to pay, and the premises, after the sale and after the maturity of the mortgage, became incumbered by taxes and assessments, that in the absence of notice to the mortgagee, and a request to foreclose, D. was liable in an action to foreclose the mortgage, for a deficiency, in ascertaining which the amount of said incumbrances was deducted from the proceeds of sale. (*Marshall* agt. *Davies*, 78 N. Y., 414.)

23. As to whether, in such case, a notice to the mortgagee, and request, after the mortgage is due, to foreclose, will avail to impose upon him, in case of his non-compliance with the request, the damages resulting from an impairment of the security, or whether the mortgagor has any remedy except to protect himself by paying his bond and becoming subrogated to the rights of the mortgage, *quære*. (*Id.*)

NATURALIZATION.

See CITIZENSHIP.

The People ex rel. O'Donnell agt. *McNally*, ante, 500.

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NEGLIGENCE.

1. The general appearance and answer of a defendant corporation ought to be deemed an admission of its corporate existence; and it ought not afterwards, when no special issue is presented, insist that plaintiff must produce and prove its character; at all events, in such case it is enough to show user or corporate acts to make a *prima facie* case of the entity and identity of such corporation. (*Derrenbacher* agt. *The Lehigh Valley Railroad Company*, ante 283.)

2. The plaintiff, a canal boatman, in helping to discharge iron ore from a boat at Perth Amboy, pushed the iron tub which was being hoisted by a derrick as was customary and thus went partly under the tub, which fell upon him, causing the injury sued for:

Held, that the question of contributory negligence of plaintiff's act was properly submitted to the jury, such act not being *per se* evidence of negligence.

Held, also, that some slight evidence having been given that defendant was the owner of the derrick and of the rope used, and the use of the derrick being much for the benefit of defendant and as the iron ore was being transferred by its consignees to defendant's cars in the usual way, and as it should not be presumed that the consignees were trespassing in making use of the derrick, in the absence of all explanation on defendant's part, the jury were justified in finding that the consignees were using the derrick in the usual way, with defendant's knowledge and consent, and for its and their mutual benefit.

Held, further, that, defendant was, therefore, liable if the rope was unsafe and unfit for the work, and there being some evidence to go to the jury on these questions, the court properly submitted the questions to them, some force

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being properly given to the omission of defendant to give explanatory evidence. (*Id.*)

See MASTER AND SERVANT.

Murphy agt. *Boston and Albany Railroad Company*, ante, 197.

See *McCosker* agt. *Long Island Railroad Company*, ante, 258.

8. While one of the defendant's cars was passing down a street, in the city of Brooklyn, a horse and wagon coming down a street at right angles with the street over which the car was moving ran into it and injured the plaintiff, a passenger therein, who brought this action to recover the damages sustained thereby. The wagon was coming at a rapid rate of speed, and could have been seen, when the car reached the line of the intersecting street, at the distance of 250 feet. There was no evidence that its rate of speed increased before the collision, which occurred just before the car reached the further side of the said street. The car might have been stopped in twelve feet:

Held, that it was error to direct a nonsuit, and that the question whether it would not have been prudent for the driver, under the circumstances, to have stopped the car should have been submitted to the jury. (*Watkins* agt. *Atlantic Avenue R. R. Co.*, 20 *Hun*, 237.)

4. The plaintiff's horse, while passing, in charge of his servant, along a street in which the tracks of the defendant's road were laid, caught his hoof in a space between the rail and a plank which the defendant had laid alongside of it to facilitate the crossing of the tracks by teams. The horse wrenched his hoof off, and was thereby rendered valueless. The space between the plank and rail was greater than was necessary for the free operation of defendant's cars.

In an action by the plaintiff to

recover the damages thereby occasioned to him, *held*, that he was entitled to recover. (*Cuddeback* agt. *Jewett*, 20 *Hun*, 187.)

NEW TRIAL.

1. Where on a trial before a referee, the evidence received erroneously by the referee is material and bears upon an important issue, it must be presumed to have been influential with him and a new trial must be ordered. (*Chandler* agt. *Allen*, 20 *Hun*, 424.)
2. Under the statute authorizing the granting of a new trial on motion of the prisoner, after conviction (*chap. 295, Laws of 1876*), the court has no power to grant such a motion, for an alleged error, where no exception was taken on the trial. (*Buel* agt. *People*, 78 *N. Y.*, 492.)
3. The provision of the statute enlarging the jurisdiction of the courts of sessions in the city and county of New York (*sec. 8, chap. 837, Laws of 1855, as amended by chap. 830, Laws of 1858*), which authorizes an appellate court to grant a new trial in capital cases when satisfied that the verdict is against the weight of evidence, &c., whether an exception was taken or not in the court below, has no application to writs of error in other counties of the state. (*Id.*)

NEW YORK (CITY OF).

1. The provisions of the charter of the city of New York providing that the board of aldermen and assistant aldermen of that city should be the exclusive judges of the qualification, election and return of their members, do not take away from the supreme court its inherent power of determining upon *quo warranto* whether a person was duly elected to and quali-

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fied for such office. The power is a concurrent and not an exclusive one, and the jurisdiction of which ever attaches first continues to the termination of the proceeding. Therefore, if the claimant to the office submits himself to the jurisdiction of the board to which he claims to have been elected, and that board decides against his title he cannot afterwards invoke the aid of the court, but if the aid of the court is sought first its judgment is conclusive. A person who receives the certificate of election to an office of which he gets possession ceases to be an officer *de facto* from the time of judgment of ouster. No further proceeding or writ is necessary to put the officer *de jure* into legal possession of the office, and a payment by the financial officer of a municipal corporation to such *de facto* officer, after notice of such judgment of ouster, does not protect the municipality from the payment of the same salary to the officer *de jure* from and after the time of such notice. (*McVeany* agt. *The Mayor, &c.*, ante, 106.)

2. The common council of the city of New York have no power or right to authorize the placing or continuing of any obstruction upon any street or sidewalk, except the temporary occupation thereof during the erection or repair of a building on a lot opposite the same. (*The People ex rel. O'Reilly* agt. *The Mayor, &c.*, ante, 277.)

3. The common council by resolution declared that licensed vendors should be permitted to occupy Forty-second street, west of Eighth avenue and within 325 feet of that avenue, Saturday nights from 6 to 12 o'clock:

Held, that to permit the street to be occupied and obstructed in this manner is clearly unlawful. It not only prevented its use and enjoyment for the ordinary purposes for which it is maintained,

but also deprived the owners and residents upon it of the complete and beneficial use and enjoyment of their own property; and as to them the obstruction was substantially a nuisance, and a party suffering special injury from it has a right to appeal to the courts for redress:

Held, further, that where the superintendent of incumbrances and the commissioner of public works (who in terms are authorized to keep the streets clear of obstructions) have been applied to and requested to exercise their authority and remove these obstructions, but have declined and refused so to do, a *mandamus* will issue requiring them to interpose and remove the same (*Id.*)

4. Although, as a general rule, a *mandamus* will not issue where the party has another remedy, it is not universally true in relation to corporations and ministerial officers, for while they may be liable in an action for neglect of duty they may still be compelled by this writ to exercise their functions according to law. (*Id.*)

5. Streets which include sidewalks are for the use of the public at large. Any obstruction erected on the streets or sidewalks without the sanction of the legislature is a nuisance. (*Ely* agt. *Campbell*, ante, 333.)

6. A local municipal corporation cannot give a valid permission to any one to occupy the streets or sidewalks with continuing erections or other obstructions without express power conferred by statute. (*Id.*)

7. The municipal legislature of the city of New York has no power to authorize the occupation of the streets and sidewalks, in the neighborhood of the markets, with stands and booths to be kept and maintained continuously at all hours of the day. (*Id.*)

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8. It is the duty of the commissioner of public works to remove all illegal obstructions placed upon the streets and sidewalks. (*Id.*)

NON-IMPRISONMENT ACT.

1. A warrant of arrest cannot be issued under the provisions of the act "to abolish imprisonment for debt and to punish fraudulent debtors" (*chap. 800, Laws of 1881*), to enforce a judgment in an action in tort. To authorize the issuing of the warrant it must appear by the affidavit presented that the judgment was founded upon a contract, or that the cause of action was to recover damages for the non-performance of a contract, express or implied. (*People ex rel. Dusenbury agt. Spier, 77 N. Y., 144.*)
2. A contract within the meaning of the act must be one resulting from the voluntary arrangement of the parties, and not one implied by law for the purpose of giving a remedy for a wrong. (*Id.*)
3. The implied contract referred to in said statute (*sec. 1*) is one where, although not expressed in words, the intention of the parties to contract may be presumed from their acts and the surrounding circumstances, so that there appears to be the "*aggregatio mentium*," essential to a contract at common law. (*Id.*)
4. Accordingly, *held*, where an affidavit, presented for the purpose of obtaining a warrant under said statute, set forth a judgment in an action for obtaining money deposited in court, by fraud and imposition, and in violation of an injunction, that defendant was not protected from arrest in that action by said statute; and that the affidavit did not give jurisdiction to issue a warrant under the statute. (*Id.*)

NOTICE.

1. The notice of entry of judgment required to be served (*new Code, sec. 1851*), in order to limit the time of appeal from a judgment entered upon the report of a referee must be one coming from the prevailing party; no other party, nor the attorney representing another party, has the right to serve a notice for the prevailing party; and a notice so served will not, so far as he is concerned, set running the bar of the statute. (*Kilmer agt. Hathorn, 78 N. Y., 229.*)
2. Two of three trustees brought an action, among other things, to determine the validity of claims upon the trust fund, in which action B., a co-trustee, was made a party defendant. Judgment was entered upon the report of a referee against certain of the defendants; B. was only affected thereby as trustee. Notice of judgment was served by plaintiff's attorney on defendants; no notice thereof was served on behalf of B. Within thirty days after such service, notice of appeal, on the part of one of the defendants against whom the judgment was rendered, was served upon plaintiff's attorney; none was served upon B. Upon plaintiff's motion the appeal was dismissed:
Held, error; that service of notice of appeal upon B. was not required; and that the notice of appeal was good as to the prevailing party, who served notice of judgment. (*Id.*)
3. Also *held*, that the notice of judgment was insufficient to limit the time to appeal, as the office address or place of business of the attorney was not stated as required by the rules (*Supreme court, rule 2.*) (*Id.*)
4. Of motion to allow *cestui que trust* to appeal from judgment in action brought by his trustee; who en-

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titled to. (*See Beckes agt. Hathorn*, 78 N. Y., 222.)

5. Of appeal, when required to be served on defendant who has not answered. (*See Argall agt. Pitts*, 78 N. Y., 239.)

OBJECTION.

1. When the general term will consider an error committed upon the trial, to which an exception was duly taken though not argued on appeal, considered. (*Schoonmaker agt. Wolford*, 20 Hun, 166.)

OFFER OF JUDGMENT.

1. An offer of judgment signed by defendant's attorney, to which no affidavit showing his authority to make it is annexed, as required by the Code of Civil Procedure (sec. 740), is invalid. (*Riggs agt. Waydell*, 78 N. Y., 586.)
2. A notice served upon said attorney by plaintiff's attorney declining the offer, without pointing out such defect, is not a waiver thereof. (*Id.*)
3. Defendant's attorney having served such an offer, and plaintiff, on the trial, having recovered less than the amount named, said attorney moved to be allowed to serve the affidavit *nunc pro tunc*, and for an extra allowance. The motion was denied:
Held, that if such an amendment was authorized it was in the discretion of the court, and an order denying the application therefor was not reviewable here, and that as the question of costs could not arise until this relief was obtained, the decision of the motion did not determine the right to costs, and so was not appealable on that account. (*Id.*)

OFFICER DE FACTO AND DE JURE.

1. The provisions of the charter of the city of New York providing that the board of aldermen and assistant aldermen of that city should be the exclusive judges of the qualification, election and return of their members, do not take away from the supreme court its inherent power of determining upon *quo warranto* whether a person was duly elected to and qualified for such office. The power is a concurrent and not an exclusive one, and the jurisdiction of whichever attaches first continues to the termination of the proceeding. Therefore, if the claimant to the office submits himself to the jurisdiction of the board to which he claims to have been elected, and that board decides against his title he cannot afterwards invoke the aid of the court, but if the aid of the court is sought first its judgment is conclusive. A person who receives the certificate of election to an office of which he gets possession ceases to be an officer *de facto* from the time of judgment of ouster. No further proceeding or writ is necessary to put the officer *de jure* into legal possession of the office, and a payment by the financial officer of a municipal corporation to such *de facto* officer, after notice of such judgment of ouster, does not protect the municipality from the payment of the same salary to the officer *de jure* from and after the time of such notice. (*McVeany agt. The Mayor, etc., ante*, 106.)

PARTIES.

1. Where the decree of a surrogate directed an administratrix to pay to the plaintiff, as general guardian of their infants, a certain sum "for each of said infants, as the distributive shares" of each of them:
Held, upon demurrer to the com-

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plaint, in an action brought by the general guardian of one of the infants for her separate share, that the other infants were not necessary parties to the suit, and that a separate suit might be brought for each share. (*Hauenstein* agt *Kull*, ante, 24.)

2. In an action to foreclose a mortgage, the bond accompanying the mortgage being executed by a person other than the mortgagors as well as by the mortgagors, it is proper to make such obligor a party to the action and to demand against all the obligors a judgment for any deficiency. (*Thorne* agt. *Newby*, ante, 120.)

3. The objection than an action "*in personam*" at law is united with a claim "*in rem*" in equity is not well taken (2 *R. S.*, p. 191, sec. 154; *Scofield* agt. *Doscher*, 72 *N. Y.*, 491.) (*Id.*)

See SAVINGS BANKS.

Paine agt. *Barnum et al.*, ante, 808.

4. Plaintiff furnished G. H. Z. certain lumber which he purchased for the purpose of building fences and other structures in his coal yard on Avenue D, in the city of New York. G. H. Z. agreed to pay cash for the lumber, but after all the lumber was furnished and used for the purpose intended, but before it was all paid for, G. H. Z. died, intestate, and the defendants, K. W. Z. and J. D. K. C., were appointed administrators. Thereafter, and before the expiration of thirty days from the time of the furnishing of the lumber, the plaintiff filed a notice of claim or mechanic's lien, and thereafter commenced an action to foreclose the same. The defendants demurred to the complaint, on the ground that it did not show a sufficient cause of action, G. H. Z. having died before the lien was filed:

Held, that the lien had attached

before the death of the owner, and the estate subject to the lien, and estate for years, passed to the administrators of the owner as part of the assets of the intestate. The administrators are liable for the deficiency, if any there should be, and the other defendants, who purchased the estate subject to the lien, are necessary parties to the foreclosure. (*Brown* agt. *Zeiss*, ante, 845.)

5. In an action against the trustee of a manufacturing company, to enforce a personal liability for permitting the indebtedness of the company to exceed its capital stock, all the creditors of the company must be joined. (*Anderson* agt. *Speers*, ante, 421.)

6. In such an action, an accounting will be necessary to determine who are creditors of the company and the ratable manner in which the excess should be distributed among them. (*Id.*)

7. Under section 452 of the Code of Civil Procedure a person interested in the subject of an action, or in the real property the title to which is sought to be affected thereby, at the time of the filing of the *lis pendens* therein, has an absolute right to be made a party thereto, if he elect so to do; but whether or not one acquiring such an interest after the filing of the *lis pendens* shall be allowed so to come in and defend rests in the sound discretion of the court. (*Harle* agt. *Hart*, 20 *Hun*, 75.)

8. An order requiring a party to an action to appear for examination before trial, under the provisions of the Code of Civil Procedure (*new Code*, sec. 870, et seq.) must be served personally upon him; a service on his attorney is not sufficient to give the court jurisdiction to punish him for not obeying the order. (*Tobo* agt. *Baker*, 77 *N. Y.*, 88.)

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9. A receiver appointed in proceedings supplementary to execution, cannot maintain an action to enforce the trust created by the Revised Statutes (1 *R. S.*, 728, *sec.* 52), in favor of the creditors of one paying the consideration for lands which are conveyed to another. (*Underwood* agt. *Sutcliffe*, 77 *N. Y.*, 58.)
10. To exclude a judge from sitting in a cause by reason of kinship, under the provision of the Revised Statutes (2 *R. S.*, 275, *sec.* 2), prohibiting him from sitting in any cause, in which he is interested, or in which he would be excluded from being a juror by reason of consanguinity or affinity to either of the parties, "such kinship must exist between him and some person who is actually a party; it is not enough that he is related to some person not a party who is, or may be interested in the cause. (*In re D. and S. M. Co.*, 77 *N. Y.*, 101.)
11. Upon petitions of the trustees and creditors of the D. and S. M. Co., a manufacturing corporation, organized in Cayuga county, an order was granted *ex parte*, appointing a receiver of said company, in pursuance of the provisions of the acts relating to such corporations in Herkimer and Cayuga (*sec.* 8, *chap.* 861, *Laws of 1852, made applicable to Cayuga county by chap.* 179, *Laws of 1858*), and on motion of the receiver an order was granted by the same judge, directing an assessment upon the stockholders. These orders were set aside, upon the ground that the judge who granted them was related by marriage within the ninth degree to several of the stockholders of the company:
Held, error; that the stockholders were not parties to the proceedings. (*Id.*)
12. As to property separable in respect to quantity and quality by weight or measure, a tenant in common may demand of a co-tenant, having possession of the whole, his share; and, upon a refusal or a conversion by such co-tenant, may sue in his own name without joining all the other co-tenants. (*Stall* agt. *Wilbur*, 77 *N. Y.*, 158.)
13. Where an action is brought by the attorney-general to vacate the charter of a railroad corporation, which has leased a portion of its road to another company, the lessee has such an interest in the subject of the action and in the real estate to be affected by the judgment as to entitle it, under section 452 of the Code of Civil Procedure, upon application for that purpose, to be made a party defendant. (*People* agt. *A. and V. R. R. Co.*, 77 *N. Y.*, 232.)
14. This especially so when the interests of the lessor are protected by stipulations rendering the judgment innocuous as to it, though fatal to the rights of the lessee, and where there is reason to suppose that the lessor is not unfriendly to such a judgment. (*Id.*)
15. The court of special term has no power to grant an order for the examination of a defendant for the purpose of enabling the plaintiff to make and serve his complaint. (*Holshon* agt. *Knickerbocker Life Ins. Co.*, 77 *N. Y.*, 278.)
16. The right to such an examination is purely a statutory one; the mode pointed out by the statute must be followed; and by the statute (*new Code*, *secs.* 872, 878) the application must be made to, and the order granted by a judge, not by the court. (*Id.*)
17. Such an order, made by the special term, is reviewable here. (*Id.*)
18. In proceedings by the attorney general for the appointment of a receiver of a life insurance com-

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- pany, pursuant to the act of 1869 (*chap. 902, Laws of 1869*) the court has jurisdiction to permit parties interested in the administration of the assets of the corporation to appear and represent their own interests, and to be made parties to all proceedings taken by or against the receiver by which their rights may be affected. (*In re Att'y-Gen. agt. N. Am. L. Ins. Co.*, 77 N. Y., 297.)
19. Persons thus becoming parties to the proceedings have a right to appeal from all orders made therein affecting their interests. (*Id.*)
20. The provision of the Code of Procedure (*old Code, sec. 99, sub. 2*), declaring that an action shall be deemed commenced, within the meaning of the statute of limitations, when the summons is delivered to the sheriff or other officer with intent that it shall actually be served, applied only to defendants who were parties to the action at the time of such delivery, or who were made parties before the statute had run against the claim upon which the action was brought. (*Shaw agt. Cock*, 78 N. Y., 194.)
21. Such delivery of the summons did not prevent the running of the statute in favor of persons who, although liable upon the obligation sued upon, were not named as defendants in the summons; and it is immaterial whether the omission was by design or through ignorance, mistake or inadvertence. (*Id.*)
22. So, also, where by order amending the summons a new party defendant was brought in, the suit was only commenced as to him when thus brought in; and if between the time of the commencement of the action as to the original parties, and the time when the new defendant was brought in, the period of limitation had expired, a plea of the statute in bar of his liability is good. (*Id.*)
23. The words "party to an action," in the provision of the Code of Civil Procedure (*new Code, sec. 870*), providing for the taking of the deposition of a party before trial, includes only parties to the record; that a person is a party in interest is not sufficient to authorize his examination under said provision. (*Seeley agt. Clark*, 78 N. Y., 220.)
24. Where a statute imposes a duty upon a citizen, any person having a special interest in the performance thereof may sue for a breach, causing him injury. (*Willy agt. Mulledy*, 78 N. Y., 310.)
25. An executory contract in writing, not under seal, executed by an agent and within the scope of the authority of the latter, may be enforced by the principal although executed in the name of the agent; and this whether he describes himself as agent or not, or whether the principal is known or unknown. (*Nicoll agt. Burke*, 78 N. Y., 580.)
26. Where, in a written lease for a year, not under seal, after the name of the lessor were the words "agents, as landlords:"
Held, that the words, as "landlords," did not prevent the owners of the premises, for whose benefit the lease was in fact made, from bringing an action in their own name to recover rent due. (*Id.*)
27. The provision of the Code of Civil Procedure (*sec. 870*), authorizing the taking of the deposition "of a party to an action," before trial, at the instance of an adverse party, does not authorize the examination of the directors of a corporation, which is a party. (*Boorman agt. At. and Pac. R. R. Co.*, 78 N. Y., 599.)
28. Nor can such directors be required to produce before trial, for the inspection of the opposite party, the books of the corporation, or to give him sworn copies of entries therein, under the provision (*sec.*

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808) authorizing the court to compel such production or copy by "a party to an action." (*Id.*)

29. *It seems*, that to authorize the production of books and papers under said provision, it must be shown that they are in the possession or under the control of the person required to produce them. (*Id.*)

80. When heirs instead of personal representatives are proper parties to bring an action for breach of agreement on part of grantee to pay a mortgage. (*See Ayers* agt. *Dixon*, 78 N. Y., 318.)

PARTITION.

1. This court has jurisdiction in all actions, legal or equitable, brought by an assignee in bankruptcy to recover the estate of the bankrupt, or to determine rights to property claimed by him as such assignee, or in any way affecting the same, and the jurisdiction conferred upon the Federal courts by section 1 of the bankrupt act was not exclusive. Nor does the subsequent amendment to that section passed June 22, 1874, affect the statute in this respect. (*Rutherford* agt. *Hewey et al.*, ante, 281.)

2. An assignee in bankruptcy may maintain an action for partition. (*Id.*)

3. Leave of the bankruptcy court is not necessary before commencing the action. (*Id.*)

4. The two years' limitation of the bankruptcy act has no application to such a case as this. The suit is not to recover property in dispute or to which there is any adverse claim, but it is brought for the purpose of getting it into a situation where it will bring the largest sum to the estate. (*Id.*)

5. Nor does the discharge of the

bankrupt restore to him this property. (*Id.*)

PARTY WALL.

1. Without an agreement between the owners of property, allowing them, windows have no proper place in a party wall. (*St. John* agt. *Sweeney*, ante, 175.)

2. Whether the erection of fire escapes by the defendant would be an improper use of the party wall, *quære*. (*Id.*)

3. Upon disputed facts, and especially such an one as the existence of an agreement as to the mode of use of a party wall for all time, the only evidence thereof being acts of parties, the court will not decide on *ex parte* affidavits. (*Id.*)

PENSION.

1. Although an attorney is prohibited by the laws of the United States from charging or taking more than ten dollars for prosecuting a claim for a pension, such prohibition does not cover services rendered for the person claiming the pension after the certificate for the same was issued. (*Ades* agt. *Howe*, ante, 459.)

PERSONAL JUDGMENT.

1. In an action brought to foreclose a lien, filed against a fund in the possession of the mayor, etc., of New York, on account of a contract made by them for public work in said city, the court has power under the act of 1878 (*Laws of 1878, chapter 315*), to render a *personal judgment* against the original debtor for the amount due from him in excess of the amount for which a lien has been established. (*Byron* agt. *The Mayor*, ante, 455.)

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2. Where the lien is established to a certain amount, in such a case a *personal judgment* can be rendered in favor of the plaintiff against the contractor for the full amount due from him. (*Id.*)

PLEADINGS.

1. An action may be maintained by a general guardian in his own name to recover a debt due to his ward. (*Hausenstein agt. Kull, ante, 24.*)
2. Where the decree of a surrogate directed an administratrix to pay to the plaintiff, as general guardian of their infants, a certain sum "for each of said infants, as the distributive shares," of each of them:
Held, upon demurrer to the complaint, in an action brought by the general guardian of one of the infants for her separate share, that the other infants were not necessary parties to the suit, and that a separate suit might be brought for each share. (*Id.*)
3. Where a public officer performs a specific act in pursuance of a statute, it must be presumed to have been done for the purposes of the act, and in pleading it is sufficient to aver the performance of the act. (*Id.*)
4. Thus, where a bond given by an administratrix, was ordered by the surrogate to be assigned to the general guardian, under the statute, the presumption is that it was directed to be assigned for the purpose of being prosecuted. (*Id.*)
5. A discharge in bankruptcy may be pleaded by a simple averment, that on the day of its date it was granted to the bankrupt, setting forth a copy thereof. In such a case it is not necessary for the defendant to allege the facts which show that the court of bankruptcy

had jurisdiction of the party or of the subject-matter. (*Cromwell et al. agt. Burr, ante, 93.*)

6. All other proceedings which are relied upon to discharge a bankrupt from his debts must, when pleaded, be accompanied by averments which show that the court in which they were taken had jurisdiction of the parties and of the subject-matter. Such proceedings are regarded as the judgment of an inferior court of special and limited jurisdiction, or as a discharge in insolvency, and jurisdiction must be shown by the averment of facts which conferred it. (*Id.*)
7. In an action against two defendants a complaint will not be held defective on a joint demurrer by both, put upon the ground that it does not state facts sufficient to constitute a cause of action, if it states a cause of action against either. (*Fish agt. Hoe, ante, 238.*)
8. That there is a misjoinder of parties defendant is not a ground of demurrer. The defect of parties defendant, for which a demurrer may be interposed, is a deficiency. (*Id.*)

See ANSWER.

Smith agt. Gratz, et al., ante, 274.

9. This action was brought upon certain promissory notes made by the defendant to the order of one Duryee, for whom they were discounted by the plaintiff. The defendant answered, alleging that he executed the notes for the accommodation of Duryee and without any consideration, which fact was known to the plaintiff at the time when it discounted the said notes; that at the time it received from Duryee, as collateral to and to secure the payment of the said notes, a mortgage, which was then in process of foreclosure; and it prayed that this action might be stayed during the pendency of the

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one to foreclose the mortgage, or that the defendant might be subrogated to the rights of the plaintiff in the foreclosure suit, and for other relief:

Held, that it was error to strike out the answer as frivolous. (*Chatham National Bank* agt. *Shipman*, 20 Hun, 548.)

10. Plaintiff's complaint alleged, in substance, that he negotiated with defendant, a real estate broker, for the purchase of a house; that plaintiff, upon defendant's representations that it was necessary, in order to secure the house, placed in defendant's hands two checks for \$1,500, which he agreed to return if plaintiff, after inquiry concerning the house, concluded not to purchase; that plaintiff upon inquiry did so conclude, and demanded a return of the checks, which defendant refused, and wrongfully converted the checks, &c. The complaint also alleged certain representations by defendant known by him to be false, and "that he made them for the wrongful and fraudulent purpose of inducing the plaintiff to part with his said money, and of converting wrongfully the same." Plaintiff demanded judgment "for the wrong and injury aforesaid, and that defendant be adjudged and pay him damages to the amount of \$1,500, with interest." Upon the trial no fraud was proved. Defendant's counsel moved for a dismissal of the complaint on the ground that the cause of action alleged was for fraud; the court denied the motion, holding that the complaint was on contract:

Held, that the ruling would not be interfered with; that as the complaint stated plainly a complete cause of action on contract, defendant was not embarrassed in his defense, and the allegations of fraud could properly be disregarded; that in such case this court would not interfere, except for very manifest error. (*Nesfel* agt. *Lightstone*, 77 N. Y., 96.)

11. *It seems*, that the appropriate remedy of defendant in such case is to move before trial to make the complaint more definite and certain; or to strike therefrom the redundant matter. (*Id.*)

12. *It seems*, also, that under such a complaint, no order of arrest having been obtained, an execution against the body could not properly be issued. To justify such an execution it must be clear from the pleadings and judgment that the action is one in which it is authorized; and upon a motion to set it aside it is competent to show the theory upon which the case was tried and decided. (*Id.*)

13. Where a discharge in bankruptcy is pleaded, the territorial jurisdiction of the court, granting the discharge, to entertain the proceedings, is an issuable fact. (*Poillon* agt. *Lawrence*, 77 N. Y., 207.)

14. Plaintiff's complaint alleged, in substance, that defendant executed to it a lease or agreement transferring the right to collect the wharfage of one of its piers, which defendant was required by law to maintain for the public use; that plaintiff took the lease upon the representation that substantial repairs should be made by defendant, and that plaintiff should not be required to make any save ordinary and usual repairs; that when the lease was made the pier was old and substantially destroyed by natural wear and decay, and defects hidden under the surface of the water; that defendant neglected to make such substantial repairs; in consequence the pier fell, leaving nothing to repair and requiring the erection of an entire new pier, which defendant refused to build, and plaintiff was compelled to rebuild, etc. Plaintiff claimed to recover the cost of rebuilding and the damages. By the lease it was provided that plaintiff should keep the pier in

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good condition and safe and proper repair, and that all alterations, improvements and repairs of whatsoever nature or kind should be made at its expense, and should revert to defendant at the expiration of the lease:

Held, that the complaint did not set forth a cause of action, and a demurrer thereto was properly sustained; that the alleged representations did not vary or add to, but were merged in the written agreement; that the omission to exercise a power conferred upon defendant to make an improvement was not a cause of action; and, as the complaint alleged that the pier was entirely gone, rendering the construction of a new pier necessary, the case was the same as if no pier had been built, and no duty rested upon it to build one; but assuming it was the duty of the city, as to the public, to make repairs, and thus maintain the pier, the covenant in plaintiff's lease requiring it to make all repairs was an answer to any claim on its part for a loss arising from the want of such repairs. (*Hartf. and N. Y. Stbt Co. agt. Mayor, etc.*, 78 N. Y., 1.)

15. A defendant, by not answering the complaint, does not admit that plaintiff is entitled to the relief demanded against him, but only that he is entitled to such relief, as the facts properly alleged, authorize. (*Argall agt. Pitts*, 78 N. Y., 289.)

16. A defense made by way of new matter not constituting a counterclaim, is deemed controverted; and plaintiff, without pleading, may traverse or avoid it, and is entitled to the benefit of every possible answer to it the same as if pleaded; for that purpose evidence, admissible under the principles of either law or equity, takes the place of pleading. (*Arthur agt. Homestead F. Ins. Co.*, 78 N. Y., 462.)

PRACTICE.

1. When an order is issued by a judge having jurisdiction the person upon whom it is served has two paths to pursue, and only two, if he desires to avoid contempt of court. He must either obey it, or procure it to be set aside. Even if it be erroneous he has no right to disregard it. (*Wilcox agt. Harris, ante*, 262.)

2. Questions which arise in the presence of the referee and in the course of the proceeding, and which he has not authority to settle, may very properly be brought at once before the judge who granted the order; but questions arising away from the referee and touching the validity of the order itself are entirely different in their nature and do not belong to the proceeding before the referee, nor can they properly be raised there. (*Id.*)

3. On an application to punish a party for contempt in disobeying an order, to her directed as a third party in supplementary proceedings, it is no excuse that she appeared and objected that no legal service of the order had been made upon her. The plaintiff having proof of service sufficient on its face the respondent will avoid the service only by the same application that would avoid the order itself. She has no right to meet that proof of service by a counter-affidavit before the referee, nor ask that she be examined there or before the judge who granted the order personally on that subject. (*Id.*)

4. There can be no appeal from an order of the marine court granting a new trial without the stipulation required by the act of 1874. Nor have the provisions of chapter 479 of the Laws of 1875 abrogated or repealed the provisions of the act of 1874. (*People ex rel. Sulks agt. Talcott, ante*, 269.)

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5. The absence of the stipulation and the appeal from the order assuming the appeal was regular under the act of 1875, took the case out of the provisions of the act of 1874 and left the court of common pleas to the exercise of the discretion vested in that court in such cases by subdivision 2 of section 43 of chapter 479 of the Laws of 1875, and the exercise of that discretion is not reviewable at a special term of this court on the extraordinary writ of prohibition. (*Id.*)
6. The relator if aggrieved by the judgment of the court of common pleas because of any irregularity of form, has a plain remedy by application to that tribunal for the correction of the judgment, this court should not interfere by prohibition while so simple and easy a remedy lies open to the relator. (*Id.*)
7. As there was no lawful appeal which could give the court of common pleas jurisdiction under the statute, the case has remained in legal contemplation in the marine court, subject to the order of the general term granting a new trial, and this court will not interfere with the functions of that tribunal in this case by a writ of prohibition. (*Id.*)
8. A special term caption does not alter the real character of an *ex parte* order, or deprive an adverse party of the right to move on notice to vacate or modify it. (*Matter of Braks, ante, 829.*)
9. An order appointing a trustee and directing payment to him of moneys under the provisions of a will, which the court has, by decree, declared to be inoperative, is void; and such trustee being an alien and non-resident, the application for such order was an attempt to evade the provisions of the decree. (*Id.*)
10. Where justification of sureties on appeal to the court of appeals has been inadvertently adjourned "out of court," the appellant has no such "fixed right" to sue on the undertaking to the general term as prevents the court from directing the new bond to be filed *nunc pro tunc*. (*Hardt et al. agt. Schulting, ante, 853.*)
11. In an action against a sheriff to recover for alleged false returns of several executions, the mere issuing of a prior execution is no defense in itself; nor can the sheriff stultify his own return so as to justify under another execution which he has also returned unsatisfied. (*Johnson Bros. & Co. agt. Reilly, ante, 854.*)
12. It matters not how many executions the sheriff may have had, unless there is some averment showing that they affected the plaintiffs' execution. (*Id.*)
13. One Cornelia Wolford died leaving a will by which she devised all her property to Sarah A. Schoonmaker, and appointed the said Sarah and her husband executors thereof. An application made by the executors for the probate of the will was opposed by the three brothers of the deceased, her only heirs-at-law and next of kin, on the ground that she was of unsound mind and incapable of making a will. Upon the hearing one of the brothers was allowed by the surrogate, against the objection and exception of the proponents of the will, to testify as to personal transactions had with the deceased. Subsequently the other brothers were allowed to give similar testimony, without any specific objection to it being made or exception to it taken by the said proponents. (*Schoonmaker agt. Wolford, 20 Hun, 166.*)
14. Upon an appeal from a decree of the surrogate refusing to admit the said will to probate, *held*, that

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section 829 of the Code of Civil Procedure forbidding any person interested in the event of an action or special proceeding from testifying in his own behalf as to any personal transactions or communications with the deceased, as against his executor, or any person interested through or under him, was applicable to surrogates' courts. (*Id.*)

15. That although technically the proponents were neither executors of or legatees under the will until it was admitted to probate, yet, as it was well executed as regarded all legal formalities, they held before the surrogate the position of executors and legatees, and were protected by the said section.

That the evidence was inadmissible under the said section, and that it should have been rejected. (*Id.*)

16. That the surrogate having ruled, when the objection was made to the testimony of the brother first called, that such testimony was admissible, the proponents were not bound to renew the objection and exception each time that similar testimony was given by the other brothers. (*Id.*)

17. That the erroneous admission of the evidence could not be disregarded, as the court could not say that such evidence did not affect the result in this case.

Quere, as to whether the doctrine that the appellate court might, in its discretion in equity cases, disregard errors in the admission of evidence, if satisfied that the findings of fact were supported by other and sufficient proof, has not been overturned by the decision of the court of appeals in *Phots agt. Beecher*. (*Id.*)

18. When the general term will consider an error committed upon the trial, to which an exception was duly taken though not argued on appeal, considered. (*Id.*)

19. In 1856 one Howell purchased certain lands upon which there were then two mortgages, one for \$5,500, and the other for \$1,800. The payment of the first mortgage was assumed by Howell in his deed, but no reference was made therein to the second. In 1857 the second mortgage was foreclosed, the summons being served on Howell by publication. Upon the sale the owner of the second mortgage purchased and took possession of the land, paid taxes, and subsequently satisfied the first mortgage. Thereafter the premises were conveyed to various persons, and finally by a deed, with covenants of warranty, etc., to the defendant Clara B. Leavitt, a married woman, who bought them subject to a \$15,000 mortgage given by one of her grantors, of which she assumed the payment.

It appeared that Howell was dead at the time it was attempted to serve the summons on him by publication. In November, 1878, the heirs of Howell brought an action of ejectment against the defendant Leavitt, and recovered a judgment therein by default.

In this action commenced in December, 1878, to foreclose the \$15,000 mortgage and hold the said Clara B. Leavitt liable for any deficiency, she denied her liability therefor, on the ground that as no title passed to her from her grantor, there was no consideration for her covenant to assume the mortgage:

Held, that she was in possession of the premises as a mortgagee in possession. That being so in possession, the heirs of the mortgagor could not maintain ejectment against her. That the evidence as to the action of ejectment was to be entirely disregarded in the present action. (*Dunning agt. Fisher*, 20 Hun, 178.)

20. That her right to sue on the covenants of title, contained in the deed from her grantor, was

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sufficient to uphold her covenant to pay the mortgage. (*Id.*)

21. In an action for the foreclosure of a mortgage the plaintiff made the unknown devisees, under a supposed will of the deceased mortgagor, parties defendant, and applied for an order directing the service of the summons upon them by publication. The plaintiff's affidavit showed that he had been unable to ascertain whether the mortgagor devised the premises by any last will, for which reason the devisees under such will, if any, were unknown to the plaintiff, and were made parties defendant. The order, after referring to the affidavit and directing the service of the summons by publication, proceeded, "and it satisfactorily appearing to me that the plaintiff cannot, with reasonable diligence, ascertain a place or places where the defendants * * * would probably receive matter transmitted through the post-office, the deposit of any papers therein, directed to said defendants, is dispensed with."

Held, that the order was sufficient, and that it was not necessary that the order should state that it satisfactorily appeared to the justice "by the affidavits on which the order was granted," that the plaintiff could not ascertain the residence of the unknown devisees. (*Greene agt. Squires*, 20 Hun, 15.)

22. It is sufficient if the order directing the publication designated by name two papers in which the publications shall be made; it is not necessary that the order should state that those so designated are most likely to give notice to the defendants. (*Id.*)

23. April 30, 1878, the plaintiff purchased from the defendant, at St. Louis, a ticket for Dennison, Texas. He had with him a valise containing wearing apparel and a box or trunk containing merchandise.

Upon applying for checks he informed the defendant's agent that the trunk contained articles other than his baggage, and was required to, and did, pay extra compensation for the transportation thereof by the defendant. The valise and trunk having been burned the plaintiff brought an action to recover for the loss of the contents thereof, describing the articles as baggage. Upon the trial upon the demand of the defendant, the court refused to allow the plaintiff to recover for the loss of the articles of merchandise, on the ground that they were not included in the word "baggage," used in the complaint. The plaintiff having recovered in that action for the loss of his baggage, brought this action to recover for the articles of merchandise:

Held, that his right to recover for the loss of his merchandise was not litigated in the former action, and that the judgment therein was not a bar to the prosecution of this action. (*Millard agt. Missouri, Kansas and Texas R. R. Co.*, 20 Hun, 191.)

24. That the contract to carry the baggage was distinct and separate from the contract for the carriage of the merchandise. (*Id.*)

25. Between April 25, 1870, and December 12, 1871, the Transcript Association, under proper employment, did printing for the county of New York, reasonably worth the sum of \$30,956.85, and, under like employment, between May 1, 1871, and January 1, 1872, did printing for the city of New York which was reasonably worth the sum of \$13,605.40. The claims were assigned to the plaintiffs in January, 1872.

In this action, brought against the city of New York to recover the said amounts, the city interposed a set-off, founded on the fact that in the year 1869, and in January, 1870, the said association received from the city sums

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amounting in the aggregate to \$117,419.99 for arrearages for advertising for the city government, and for a claim for advertising for the common council, as adjusted by the comptroller under chapter 853 of 1868, and that in said amount there was a gross overcharge which had been fraudulently presented, passed upon and obtained:

Held, that the set-off was a proper one, and that the defendant was entitled to interpose it as against the plaintiffs claiming as assignees of the said association. (*Taylor* agt. *Mayor*, 20 *Hun*, 292.)

26. That chapter 304 of 1874, imposing upon the city of New York the payment of county charges, transferred to the city all existing equities, set-offs and defenses that could be interposed to such charges either by the city or county at the time it was passed. (*Id.*)

27. The failure to present a claim to the comptroller of New York city before suit thereon affects the remedy only; such presentation does not in any way determine the existence of, or create the debt. (*Id.*)

28. In this action, brought upon a promissory note, the defenses were that the note was void for usury, and also that it had been superseded by reason of its being included in a new note given by the defendant to the plaintiff, which was still outstanding. The jury having found a verdict in favor of the defendant the plaintiff moved to set it aside, claiming that even if the note was void for usury he was entitled to recover upon the original valid indebtedness for which it was given, and that as the renewal note was usurious and void the fact that it was outstanding was no defense to the action:

Held, that the action having been brought upon the note the plaintiff could not recover upon the original

valid debt without setting the same forth and claiming to recover thereon in his pleadings. (*Hansen* agt. *Phinney*, 20 *Hun*, 158.)

29. The plaintiff, as the administrator with the will annexed of one Adaline Brooks, deceased, brought this action to compel the specific performance of a contract made by the deceased, in her life-time, for the sale of certain land owned by her to certain of the defendants herein. The vendees had made all the payments that could be required, except that which was to be made on the delivery of the deed, which the heirs refused to execute. The heirs and the vendees were all made defendants to this action:

Held, that the action could be maintained, and that as the heirs refused to execute a deed the plaintiff was not obliged to tender one to the vendees before the commencement thereof. (*Wheeler* agt. *Crosby*, 20 *Hun*, 140.)

30. Upon a hearing before a referee, appointed to report as to the distribution of surplus moneys arising upon a sale, under a decree in foreclosure, a claimant produced a mortgage concededly the first lien thereon, but which contained a clause apparently reserving a life estate in the premises in favor of the mortgagor, by virtue of which the judgment creditors of the mortgagor claimed to be entitled to have the value of such life estate first set apart from such surplus and applied to the payment of their debts. The referee, against the objection and exception of the said judgment creditors, allowed the owner of the mortgage to prove that such clause had been inserted by mistake, and having found that such was the fact he held that the mortgage was entitled to priority over the subsequent judgments:

Held, that the referee had power to inquire and determine whether or not the clause was inserted in

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the mortgage by mistake, and that having found it was so inserted he properly gave the mortgage priority over the subsequent judgments. (*Tator* agt. *Adams*, 20 *Hun*, 131.)

81. After the service of an amended complaint herein, and before the service of an amended answer, the defendant applied for an order requiring the plaintiff to appear and be examined before trial. The defendant's affidavit set out at length the nature of the action, the relief sought and the various matters alleged in the complaint, and alleged that the deponent was advised and believed that it was material and necessary, in the preparation of his answer that he should be permitted to examine the plaintiff as to the allegations set forth in the complaint. The affidavit then set forth the allegations as to which the plaintiff was to be examined, but mentioned no facts tending to show such examination to be necessary or material, nor did it set forth the nature of the defense to be interposed.

Upon an appeal from an order requiring the plaintiff to appear and be examined, *held*, that the affidavit was defective in not setting forth the nature of the defense to be interposed. (*Robertson* agt. *Russell*, 20 *Hun*, 243.)

82. That it was also defective in not setting forth the facts and circumstances showing an examination of the plaintiff to be material and necessary. (*Id.*)

83. In an action on contract, the defendant was arrested under an order of arrest, granted upon grounds extrinsic to the causes of action, and confined in the county jail. Subsequently he was taken and held by the sheriff under an execution against his person, issued upon a judgment entered in the action in favor of the plaintiff, which judgment was affirmed by the general term but was re-

versed by the court of appeals, by which latter court a new trial was granted because of errors committed on the trial:

Held, that the reversal of the judgment by the court of appeals only operated to restore the parties to the same position in which they were before any trial had been had, and did not supersede the order of arrest, or authorize the discharge of the defendant from confinement. (*People ex rel. Roberts* agt. *Bow*, 20 *Hun*, 85.)

84. The court will only restrain the dispossession of a tenant, under a warrant in summary proceedings, in cases of fraud, surprise or undue advantage in the actual conduct of the proceedings. (*Armstrong* agt. *Cummings*, 20 *Hun*, 313.)

85. The court will take judicial notice that premises described by the street on which they are situated are within a certain judicial district where the entire street is within the statutory boundaries of such district. (*Id.*)

86. The provisions of the Revised Statutes authorizing the dispossession of a tenant by summary proceedings, for non-payment of rent, are applicable to a lessee of a furnished house at a gross rent; the furniture in such a case is but an incident, and the rent issues out of the land only. (*Id.*)

87. October 22, 1873, the plaintiff recovered a judgment against the defendant, which was docketed in Westchester county at ten A. M. the following morning. At the time of docketing the judgment the defendant was seized in fee, as a tenant in common, of certain land in said county; at four P. M. of that day a deed was placed on record, dated and purporting to have been executed in August, 1872, conveying the defendant's interest therein to his brother. Subsequently the plaintiff brought

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an action to have the said conveyance set aside as fraudulent. Thereafter, and while the said action was pending, the defendant having procured a discharge in bankruptcy, moved, under section 1268 of the Code of Civil Procedure, to have the said judgment canceled:

Held, that the judgment should be allowed to stand so far as was necessary for the purpose of enabling the plaintiff to enforce any lien created by it upon any real estate owned by the defendant at the time it was docketed. (*Popham agt. Barretto*, 20 Hun, 299.)

38. In this action, brought against a domestic corporation, which had appeared by an attorney and served an answer, an order requiring it to allow the plaintiff to inspect its books, or show cause at a time and place therein specified, was made and also served upon its attorney.

The order having been made absolute on the return day against the opposition of the defendant, a copy thereof was served on its attorney. Upon proof of such service, and of the defendant's refusal to obey the order, an order to show cause why the defendant's answer should not be stricken out was made and also served upon the said attorney.

Upon an appeal from an order striking out the answer, *held*, that under section 799 of the Code of Civil Procedure, the orders to to show cause were properly served upon the defendant's attorney, and that it was not necessary to serve them upon any of its officers. (*Rosner agt. New York Museum Association*, 20 Hun, 182.)

39. March 1, 1867, the Marine Bank of Chicago recovered a judgment, in the supreme court of this state, against T. Van Brunt, of the city of New York, who died December 29, 1867. Thereafter an action was commenced in this state by one Hammond against the said

Marine Bank, in which an attachment was issued on June 20, 1869, under which the said judgment was attempted to be levied on, by serving a certified copy of the warrant upon one of the attorneys who represented the said Van Brunt in the action brought against him by the said bank. No copy of the attachment was served upon any of the legal representatives of Van Brunt's estate:

Held, that the attorney was not "an individual holding" the said judgment, within the meaning of section 285 of the old Code; that it could only be attached by service upon the debtor, as therein provided, and that as no such service was made the said judgment was never legally attached. (*Matter of Flandrow*, 20 Hun, 36.)

40. Where goods, wares and merchandise have been seized under an attachment, it is not sufficient to prevent a person who has acquired a lien thereon after the attachment, from moving to vacate or modify the warrant under section 682 of the Code of Civil Procedure, that a levy has been made upon the said goods, wares and merchandise, under an execution issued on a judgment recovered in the action in which the attachment was issued, unless the said goods have been actually sold, and the proceeds arising therefrom have been applied to the payment of the said judgment. (*Woodmansee agt. Rogers*, 20 Hun, 285.)

41. This action was brought to recover rent due on a lease executed by one Gibson against the defendant, as executrix of the last will and testament of the said Gibson. The defendant was appointed such executrix by the surrogate of Monmouth county, in the state of New Jersey, and, as such executrix, had taken possession of the premises so leased to the said Gibson:

Held, that the courts of this state had no jurisdiction of an action

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- at law against a foreign executrix, and that the action could not be maintained. (*Field* agt. *Gibson*, 20 *Hun*, 274.)
42. *Quare*, as to whether if the complaint had contained appropriate averments, the action could have been maintained as one in equity for an accounting. (*Id.*)
43. Under section 452 of the Code of Civil Procedure a person interested in the subject of an action, or in the real property the title to which is sought to be affected thereby, at the time of the filing of the *lis pendens* therein, has an absolute right to be made a party thereto, if he elect so to do; but whether or not one acquiring such an interest after the filing of the *lis pendens* shall be allowed so to come in and defend rests in the sound discretion of the court. (*Earle* agt. *Hart*, 20 *Hun*, 75.)
44. Where a judgment creditor was entitled, at the time of his death, to institute supplementary proceedings against his debtor, the right conferred by section 283 of the Code upon his personal representative to institute and enforce such proceedings was not taken from them by the subsequent repeal of said section by subdivision 8 of section 1 of chapter 417 of the Laws of 1877, but such right was preserved and continued in full force by the qualification of such repeal contained in section 3 of the said act. (*Pardoe* agt. *Tilton*, 20 *Hun*, 76.)
45. Under sections 549, 550, 557 and 558 of the Code of Civil Procedure as amended by chapter 542 of 1879, in order to subject a defendant in an action upon contract, express or implied, to arrest for fraud in contracting or incurring the liability sought to be enforced, the facts showing such fraud on his part, must be alleged in the complaint. (*Hecht* agt. *Levy*, 20 *Hun*, 58.)
46. The validity of an order of arrest is to be determined by the law existing at the time of the arrest of the defendant thereunder, and not by that existing at the time the order was issued. (*Id.*)
47. Where summary proceedings are instituted in one of the district courts of the city of New York, to dispossess a tenant for non-payment of rent, it is not necessary to state in the summons that the premises are situate within the judicial district in which the said proceedings are instituted. (*People ex rel. Duchardt* agt. *Kelly*, 20 *Hun*, 549.)
48. Although where the premises are described in the landlord's affidavit as situated on a certain street, which said street lies wholly within the statutory boundaries of one of the judicial districts of the city of New York, the court will take judicial notice of the fact that such premises are situated within such district; yet where they are described by the street and number, and such street extends through two or more judicial districts, the court will not, from the number of the house, determine its position upon the said street, and will not, therefore, take judicial cognizance of the judicial district within which it is situated. (*Id.*)
49. How far a party is bound by an implied concession of the existence of a fact. (*Id.*)
50. The plaintiff, on commencing an action in a justice's court, procured a short summons against the defendant, a non-resident, on an affidavit stating that the action was on a contract. Before the return day the parties appeared and the plaintiff declared on contract for cattle sold, and the defendant denied the allegations of the complaint. The case was adjourned, and on the adjourned day

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the defendant did not appear. The plaintiff then amended the complaint, declared in tort for the conversion of the cattle, recovered a judgment, filed and docketed a transcript thereof, and issued thereon an execution against the person of the defendant:

Held, that the amendment should not have been allowed, and that the execution was properly vacated and set aside by the county court, on motion. (*Gilmore* agt. *Barnett*, 20 *Hun*, 514.)

51. Where an execution issued against the person of a judgment debtor fails to require the sheriff to return it to the proper clerk within sixty days from its receipt, the execution is not thereby rendered void, and an order allowing the plaintiff to amend the same by inserting such a direction should be granted as a matter of course. (*Benedict and Burnham Mfg. Co.* agt. *Thayer*, 20 *Hun*, 547.)

52. The remedy of a defendant held by the sheriff under an execution from which such direction is omitted is by a special motion, and not by an application for a discharge under a writ of *habeas corpus*. (*Id.*)

53. This action was brought upon certain promissory notes made by the defendant to the order of one Duryea, for whom they were discounted by the plaintiff. The defendant answered, alleging that he executed the notes for the accommodation of Duryea and without any consideration, which fact was known to the plaintiff at the time when it discounted the said notes; that at that time it received from Duryea, as collateral to and to secure the payment of the said notes, a mortgage, which was then in process of foreclosure; and it prayed that this action might be stayed during the pendency of the one to foreclose the mortgage, or that the defendant might be subrogated to the rights of the plain-

tiff in the foreclosure suit, and for other relief:

Held, that it was error to strike out the answer as frivolous. (*Chatham National Bank* agt. *Shipman*, 20 *Hun*, 543.)

54. Section 757 of the Code of Civil Procedure, as amended by chapter 512 of 1879, providing that "in case of the death of a sole plaintiff or a sole defendant, if the cause of action survives or continues, the court must, upon a motion, allow or compel the action to be continued by or against his representatives or successors in interest," is only applicable to the case where there is a sole plaintiff or sole defendant. (*Obit* agt. *Campbell*, 20 *Hun*, 50.)

55. The words "sole defendant" cannot be construed as meaning "all defendants." (*Id.*)

56. *Quære*, as to how far the court is bound under said section, as so amended, to allow a continuance of the action in all cases, no matter how great the laches of which the applicant has been guilty. (*Id.*)

57. A judgment creditor is not permitted to harass his debtor by successive examinations in supplementary proceedings; after he has once fully examined him, a second order will not be granted, unless some good reason be given therefor, even though the second application be founded upon another judgment held by the same creditor against the same debtor. (*Canavan* agt. *McAndrew*, 20 *Hun*, 46.)

58. Under section 870 of the Code of Civil Procedure the plaintiff is entitled to examine the defendant for the purpose of obtaining facts necessary to enable him to frame his complaint. (*Brisbane* agt. *Brisbane*, 20 *Hun*, 48.)

59. Upon an application for an order

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requiring the defendant to appear and be examined, to enable the plaintiff to obtain facts necessary to enable him to frame his complaint, the affidavit need not state that the plaintiff intends to use the deposition upon the trial of the action. (*Id.*)

60. Upon a trial in a justices' court, the plaintiff recovered a judgment of twenty-five dollars and forty-eight cents damages and seven dollars costs, in all thirty-two dollars and forty-eight cents. Upon an appeal taken by the defendant, under section 871 of the Code, the county court affirmed the judgment as to eighteen dollars damages and seven dollars costs, in all twenty-five dollars, and reversed it as to the residue:

Held, that the plaintiff was entitled to the costs of the appeal. (*Chapin* agt. *Steele*, 20 *Hun*, 448.)

61. The plaintiff brought this action claiming to recover as the assignee of one Fisk upon certain written contracts made by and between the defendant and said Fisk. The defendant, claiming that the said contracts were forgeries, applied for an order requiring the plaintiff to deposit them with the court, in order that he might inspect them. The plaintiff, in his opposing affidavit, said "that he has not now, nor has he had ever in his possession or under his control, any of the above-named contracts."

Held, That his bare denial of the possession of the contracts upon which he had sued, without any explanation or further statement of the facts, was not sufficient to require the court to deny the application. (*Hepburn* agt. *Archer*, 20 *Hun*, 535.)

62. A motion by a judgment-debtor to set aside the judgment on the ground that he was, at the time of its entry, an infant, and that no guardian *ad litem* had been appointed for him, is not based upon a mere irregularity, but upon

an error in fact, and it is, therefore, unnecessary to specify the error in the notice of motion, as required by Rule 87 in those cases in which the motion is based upon an irregularity. (*Peck* agt. *Celer*, 20 *Hun*, 534.)

63. Upon the trial of the plaintiff in error, on an indictment charging him with being an accessory to the crime of forgery, the principal was called as a witness, and on his examination it appeared that he had never been convicted. He was then allowed by the court to be arraigned upon the indictment against him, and plead guilty thereto, after which the record of his conviction was produced by the People and offered and received in evidence:

Held, no error. (*Jones* agt. *People*, 20 *Hun*, 545.)

64. Where a plaintiff has, without first obtaining leave from the court, brought an action at law to recover a deficiency arising on the sale of certain premises under a decree of foreclosure entered in a former action, the court may, upon his application, and upon such terms as are just, grant him leave "to bring and continue" the action without prejudice to the proceedings already had. (*Earle* agt. *David*, 20 *Hun*, 527.)

65. Where after issue has been joined in an action and the same has been regularly noticed for trial at a circuit, by the defendant, the plaintiff in good faith and within the time allowed by law serve an amended complaint, the issue theretofore joined and noticed for trial is destroyed, and the action cannot be tried until new issues have been joined and regularly noticed for trial. (*Ostrander* agt. *Conkey*, 20 *Hun*, 421.)

66. When the amended pleading is served in bad faith, the remedy of the party aggrieved is by motion to strike it out. (*Id.*)

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67. The fact that an order of arrest has been vacated, on the ground that the affidavit upon which it was granted failed to establish any fraudulent intent on the part of the defendant, does not prevent the court from granting a second order of arrest in the same action upon further facts, if satisfied that the application for such second order is not vexatious. (*Mouco* agt. *Raudnitz*, 20 *Hun*, 343.)
68. A writ of *certiorari* will not lie to the corporation of the city of New York to correct alleged errors of the board of assessors, or of the board of revision and correction, of assessments therein. (*People ex rel. Robbins* agt. *Mayor*, 20 *Hun*, 73.)
69. The writ must be directed to the board having the matter in charge at the time it issues from the court. (*Id.*)
70. Where, in an action for assault and battery, committed in removing a trespasser from the defendant's premises, a recovery is allowed for an excess of force used in effecting such removal, the jury may, if they find the defendant's acts to have been wanton and malicious, award punitive damages. (*Kiff* agt. *Youmans*, 20 *Hun*, 123.)
71. A verdict in an action for an assault and battery will not be set aside on the ground that the damages are excessive, unless it appears to be the result of prejudice or passion on the part of the jury. (*Id.*)
72. A *certiorari*, to review summary proceedings for a forcible entry and detainer, may be issued after the defendant has traversed the inquisition, and before the proceedings upon the said traverse have been completed. (*People ex rel. Pierce* agt. *Coville*, 20 *Hun*, 460.)
73. Chapter 196 of the United States Laws of 1867, providing for the removal of causes into the United States circuit courts, was not repealed by chapter 187 of the Laws of 1875. (*Wickham* agt. *Wickham*, 20 *Hun*, 289.)
74. The remarks of the court addressed to counsel on the rejection of evidence, or as to the need of delaying the trial to send for witnesses, are not the subjects of exception. (*Daly* agt. *Byrne*, 77 *N. Y.*, 182.)
75. It seems, that if the remarks of the court are so adverse to one of the parties as to call for the interference of a court of review, on the ground that the verdict has been improperly influenced, the mode of review is not by exception, but the question should be brought up on motion to set aside the verdict. (*Id.*)
76. A motion at special term to set aside or strike out an amendment of a pleading made by a referee on trial is improper. (*Quimby* agt. *Clafin*, 77 *N. Y.*, 270.)
77. It seems, that the proper mode of reviewing the decision of the referee is by exception thereto and appeal from the judgment. (*Id.*)
78. This action was brought by plaintiff, as son and heir-at-law of D., to set aside a conveyance of real and personal property executed by the latter to defendants D., H. and J., on the ground of mental incapacity, and of fraud and undue influence. Both of these issues were found against plaintiff. By the terms of the conveyance the grantees covenanted to pay two-thirds of the expenses of the support and maintenance of D. and wife during their lives respectively. The complaint alleged that plaintiff had boarded and cared for said D. and wife up to their deaths, and asked for an accounting and payment therefor out of the estate conveyed:

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Held, that plaintiff was not entitled to a reference to ascertain the amount due him, if any, for such support and maintenance, both because it was inconsistent with the main relief sought by the complaint, and because the covenant was not with and for the benefit of the plaintiff; and consequently he could not maintain an action upon it. (*Van Gelder* agt. *Van Gelder*, 77 N. Y., 446.)

79. To a complaint setting forth several orders of the surrogate of the county of New York, defendant demurred upon the ground that the complaint omitted to allege the facts necessary to give the surrogate jurisdiction; the demurrer was overruled and judgment rendered for plaintiff, which was affirmed by the general term. On appeal to this court, defendant asked leave, in case the judgment should be affirmed, to withdraw the demurrer and put in an answer on terms:

Held, that the application should, under the circumstances of the case, be made to the court below; judgment therefore affirmed, with leave to make such application. (*Bearnes* agt. *Gould*, 77 N. Y., 456.)

80. Where assessors for a local improvement adopt the correct legal rule, i. e., that all property benefited must be assessed, an error in determining what property is in fact benefited must be reviewed and corrected by *certiorari*, not by suit. (*Kennedy* agt. *City of Troy*, 77 N. Y., 493.)

81. The denial of a motion to strike out incompetent evidence admitted on a jury trial without objection is not error; it may be retained in the discretion of the court; the remedy of the party is to ask for instructions to the jury to disregard it. (*Platner* agt. *Platner*, 78 N. Y., 91.)

82. Where a witness, in answering a proper question, with proper and

responsive matter, testifies to something, irresponsible and incompetent, an objection does not reach it; the proper course is for the party to move to strike out the improper portion of the answer, or to ask instructions to the jury that they disregard it. (*Id.*)

83. Upon appeal from an order of the general term granting a new trial, in a case tried by a jury, where the facts were before the general term, and it had the power to grant a new trial thereon; *held*, that as the practice in such cases had become thoroughly established and known, the order should be affirmed in accordance with the stipulation in the notice of appeal, instead of the appeal being dismissed. (*Snebley* agt. *Conner*, 78 N. Y., 218.)

84. The words "party to an action," in the provision of the Code of Civil Procedure (*new Code*, sec. 870), providing for the taking of the deposition of a party before trial, includes only parties to the record; that a person is a party in interest is not sufficient to authorize his examination under said provision. (*Seeley* agt. *Clark*, 78 N. Y., 220.)

85. The determination of questions, relating solely to matters of practice in the disposition by the court below of causes on its own calendar, will not be interfered with by this court. (*Kellum* agt. *Durfoo*, 78 N. Y., 484.)

86. The court on motion, or of its own volition, may direct questions of fact in an action to be tried at circuit. (*Id.*)

87. An offer of judgment signed by defendants' attorney, to which no affidavit showing his authority to make it is annexed, as required by the Code of Civil Procedure (sec. 740), is invalid. (*Riggs* agt. *Waydell*, 78 N. Y., 586.)

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88. A notice served upon said attorney by plaintiff's attorney declining the offer, without pointing out such defect, is not a waiver thereof. (*Id.*)

89. The provision of the Code of Civil Procedure (870), authorizing the taking of the deposition "of a party to an action," before trial, at the instance of an adverse party, does not authorize the examination of the directors of a corporation, which is a party. (*Boorman agt. At. and Pac. R. R. Co., 78 N. Y., 599.*)

90. Nor can such directors be required to produce before trial, for the inspection of the opposite party, the books of the corporation, or to give him sworn copies of entries therein, under the provision (sec. 803) authorizing the court to compel such production or copy by "a party to an action." (*Id.*)

91. *It seems*, that to authorize the production of books and papers under said provision, it must be shown that they are in the possession or under the control of the person required to produce them. (*Id.*)

PROMISSORY NOTE.

1. If an accommodation maker or indorser has no interest in the way in which the proceeds of the note are to be used, it is no defense to him that he was told the note was to be discounted by a bank, though it was in fact used and intended to be used in paying an antecedent debt. (*Wheeler agt. Allen, ante, 118.*)

See BONA FIDE HOLDER.
Phoenix Insurance Company agt. Church, ante, 293.

PUBLICATION.

1. In an action for the foreclosure of a mortgage the plaintiff made

the unknown devisees, under a supposed will of the deceased mortgagor, parties defendant, and applied for an order directing the service of the summons upon them by publication. The plaintiff's affidavit showed that he had been unable to ascertain whether the mortgagor devised the premises by any last will, for which reason the devisees under such will, if any, were unknown to the plaintiff, and were made parties defendant. The order, after referring to the affidavit and directing the service of the summons by publication, proceeded, "and it satisfactorily appearing to me that the plaintiff cannot, with reasonable diligence, ascertain a place or places where the defendants * * * would probably receive matter transmitted through the post-office, the deposit of any papers therein, directed to said defendant, is dispensed with:"

Held, that the order was sufficient, and that it was not necessary that the order should state that it satisfactorily appeared to the justice "by the affidavits on which the order was granted," that the plaintiff could not ascertain the residence of the unknown devisees. (*Green agt. Squires, 20 Hun, 15.*)

2. It is sufficient if the order directing the publication designate by name two papers in which the publication shall be made; it is not necessary that the order should state that those so designated are most likely to give notice to the defendants. (*Id.*)

RECEIVER.

1. The superintendent of the insurance department made a report in reference to The Atlantic Mutual Life Insurance Company, in pursuance of the laws of 1869, and on this report the attorney-general instituted the usual proceeding to wind up the company and place

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its effects in the hands of a receiver, and an order appointing a receiver was made. At the commencement of these proceedings the plaintiff, in behalf of the insurance company and upon and by virtue of an employment of its appropriate officers, undertook to and did defend the proceedings up to the time of the appointment of the receiver. With the decision appointing a receiver the company was not satisfied, it still insisted on its solvency and right to transact its own business; and although the defendant Newcomb, who was appointed receiver, at once filed his bond and took possession an appeal from the order was taken by the plaintiff acting as attorney of the company; and various other proceedings were had, in all of which the plaintiff appeared for and conducted the same for and on behalf of the company:

Held, that an action is properly brought and may be maintained by the attorney against the company and the receiver for his services, disbursements and expenses, and the court has power to order payment to the plaintiff out of the funds in the hands of the receiver.

Held, further (after reciting the history of the proceedings taken by the company and the further fact that all these proceedings were taken in good faith by the company and its counsel, and in the honest and conscientious belief of its solvency and ability to manage its affairs without the intervention of the court), that under such circumstances the managers and officers of the company not only had the right but it was their duty to do what they could to keep it in life; and the plaintiff having been employed by the company the court ought to exercise such power and order payment to the plaintiff out of the funds in the hands of the receiver.

Held, also, that the objection urged by the defendant that this

action by the company, these various proceedings that were had after the appointment of a receiver, must be regarded as a violation of and as prohibited by the order appointing the receiver and, therefore, contemptuous, is clearly untenable. The company are in no position to raise such a question. They having employed counsel and urged on these proceedings they cannot now object to the counsel receiving any compensation for his labor, or reimbursement for his expenses, because they were violating the order of the court when they employed and directed it to be done. (*Barnes agt. Atlantic Mutual Life Insurance Company, ante, 239.*)

2. Nor is the plaintiff's claim barred by any previous action taken by the court as to the allowance of costs. The appellate courts could make no provision except for taxable costs which, from the proof in this case, would afford no adequate compensation for the labor performed and the disbursements incurred. (*Id.*)
3. A receiver, appointed in proceedings supplementary to execution, cannot maintain an action to enforce the trust created by the Revised Statutes (1 R. S., 728, sec. 53), in favor of the creditors of one paying the consideration for lands which are conveyed to another. (*Underwood agt. Sutcliffe, 77 N. Y., 58.*)
4. The judgment debtor has no interest, legal or equitable, in lands paid for by him but conveyed to another (sec. 51), and the creditor derives no right through him; if a creditor at the time of the conveyance, he has simply an interest created by the statute as *cestui que trust*; the trust does not vest in the receiver, and he is not the representative of the creditor in respect to it. (*Id.*)
5. The regularity of the appoint-

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- ment of a receiver of a life insurance corporation upon petition of the attorney-general, cannot be questioned collaterally by any other tribunal than the one by which he was appointed. (*In re Att'y-Gen'l agt. Guard. Mut. Life Ins. Co.*, 77 N. Y., 272.)
6. A decree upon such application dissolving the corporation and appointing a receiver vests in the latter all the property of the corporation. (*Id.*)
 7. The receiver represents both the corporation and creditors and stockholders, and in his character as trustee for the latter he may disaffirm and maintain an action as receiver to set aside illegal or fraudulent transfers of the property of the corporation made by its officers or agents, or to recover its funds or securities invested or misapplied. (*Id.*)
 8. The supreme court having acquired jurisdiction of proceedings for winding up the affairs of the corporation, and having appointed a receiver, has jurisdiction to stay the suit of a creditor brought to recover assets to which the receiver is entitled, in whatever court such suit may be pending. (*Id.*)
 9. The stay may be granted on motion in the proceedings; it is not necessary for the receiver to bring an action for that purpose. (*Id.*)
 10. Where, in proceedings instituted by the attorney-general against a life insurance company under the provisions of the insurance act of 1869 (*chap. 902, Laws of 1869*), the company has been declared insolvent and its affairs put into the hands of a receiver, judicial action thereafter must follow the statute. (*In re Att'y-Gen'l agt. Atlantic Mutual Life Ins. Co.*, 77 N. Y., 226.)
 11. Where the actuary's report shows that the company is not able to go on with its business, the assets must be turned into money, liabilities paid, and the corporate affairs closed up; the supreme court cannot order the receiver to call for premiums, and keep up the business of the company, nor can it discharge the receiver and give back the property to the corporation. (*Id.*)
 12. Where a receiver has been appointed in proceedings supplementary to execution instituted in favor of one judgment creditor, in an action brought by another judgment creditor, to set aside such proceedings on the ground of collusion, it is in the discretion of the court to appoint another receiver, and to direct the first receiver to hand over to him the property received. (*Connolly agt. Kretz*, 78 N. Y., 620.)
 13. An order, therefore, making such appointment and giving such direction, is not reviewable here. (*Id.*)

REFEREE.

1. A referee has the same power to allow amendments to any pleading as the court, upon such trial, upon the same terms and with like effect, and the matter being properly at his disposal, his action will not be reviewed by a judge at chambers. (*Oregon Steamship Company agt. Otis, ante*, 254.)
2. Under the judiciary act the poundage of the referee on foreclosure and sale is limited to ten dollars, and is not increased by the act of 1876 amending section 309 of the Code of Procedure. (*Birge agt. Ainsworth et al., ante*, 478.)
3. This amendment does not give the right to such fees or poundage, but is merely a limitation of the fees or poundage allowable, the right

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thereto being dependent upon other statutory provisions. (*Id.*)

4. If the seventy-seventh section of the judiciary is repealed the referee is remitted to the three dollars per day under the general rule as to referees' fees. (*Id.*)

REFEREE'S FEES.

1. Where the husband has stipulated to pay half the referee's fees, such stipulation will be enforced. (*Bloodgood* agt. *Bloodgood*, ante, 42.)

REFERENCE.

1. A reference to assess damages upon injunction should not be granted, after appeal from the judgment is perfected, until final decision upon the appeal. (*Howard et al.* agt. *Park et al.*, ante, 844.)
2. A motion at a special term to set aside or strike out an amendment of a pleading made by a referee on trial is improper. (*Quimby* agt. *Clafin*, 77 N. Y., 270.)
8. *It seems*, that the proper mode of reviewing the decision of the referee is by exception thereto and appeal from the judgment. (*Id.*)
4. This action was brought by plaintiff, as son and heir-at-law of D., to set aside a conveyance of real and personal property executed by the latter to defendants, D., H. and J., on the ground of mental incapacity, and of fraud and undue influence. Both of these issues were found against plaintiff. By the terms of the conveyance the guarantees covenanted to pay two-thirds of the expenses of the support and maintenance of D. and wife during their lives respectively. The complaint alleged that plaintiff had boarded and cared for said D. and wife up to their deaths, and asked

for an accounting and payment therefor out of the estate conveyed:

Held, that plaintiff was not entitled to a reference to ascertain the amount due to him, if any, for such support and maintenance, both because it was inconsistent with the main relief sought by the complaint, and because the covenant was not with and for the benefit of the plaintiff; and consequently he could not maintain an action upon it. (*Van Gelder* agt. *Van Gelder*, 77 N. Y., 446.)

5. An oral agreement between the parties to an action on trial before a referee, entered by a stenographer upon his minutes, leaving it to the referee to fix his own compensation, is not an agreement in writing by the parties for another rate of compensation than that prescribed, such as is authorized by the provision of the Code of Procedure (*old Code*, sec. 313) regulating referees' fees. (*First Nat'l Bank of C.* agt. *Tomajo*, 77 N. Y., 476.)
6. If such an agreement can be considered one in writing, it is not binding as it does not fix any rate of compensation. (*Id.*)
7. The cases holding that oral agreements between parties or their attorneys, made in open court, in respect to matters connected with the litigation, are binding and will be enforced, have no application to such an agreement, as it has reference to a matter wholly collateral to the litigation which is regulated by statute. (*Id.*)
8. As to whether an objection that a referee appointed in an action resides, and that the trial was had out of the jurisdiction of the court, is valid under any circumstances, *quære*. (*Blake* agt. *L. and Mfg. Co.*, 77 N. Y., 626.)
9. The objection is untenable when the point was not raised on the

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trial, and it does not appear that the decision was not made in the jurisdiction. (*Id.*)

10. Jurisdiction having been once acquired over the parties and the subject matter, every presumption is in favor of the legality of the judgment. (*Id.*)

11. A referee had power, under the Code of Procedure (*secs.* 173, 272), on motion made at the close of the evidence in a case, to allow an amendment of a pleading, so as to conform it to the proof, where it does not substantially change the cause of action or defense. (*Chapin agt. Dobson*, 78 N. Y., 74.)

12. Where the referee, without objection on the part of the opposite party, reserved his decision on motion made for such an amendment, and granted it on deciding the case; *held*, proper. (*Id.*)

13. This action was brought for an alleged breach of an agreement in writing, by which plaintiffs agreed to furnish, and defendants to purchase, certain machines upon terms and at times specified. Defendant alleged, and was permitted to prove, under objection, a parol agreement made at the same time, and in consideration of which he executed the writing, by which plaintiffs guaranteed "that the machines should be so made that they would do the defendant's work satisfactorily;" if not, that plaintiffs would take them back; evidence was also given showing a breach of such guaranty. The referee found that the matters in writing and the oral guaranty constituted the contract between the parties:

Held, that the evidence was properly received, as there was nothing on the face of the instrument to show that it was the whole agreement between the parties, and as the oral guaranty did not controvert, and was not inconsistent with the written contract;

also that it was within the province of the referee to make such finding. (*Id.*)

REMOVAL OF CAUSES.

1. Where the amount claimed in the complaint is less than \$500, the defendant cannot, by pleading a counter-claim exceeding that sum, remove the action from a state to the United States court for trial, upon the ground that the parties are residents of different states and the matter in dispute exceeds \$500. The amount in dispute must be determined from the complaint. (*Clarkson et al. agt. Manson*, *ante*, 480.)

2. *It seems*, that when a federal corporation brings a suit in which the pleadings do not negative the possibility of the issue arising as to its legal existence, as it places itself in a position where its legal existence and its rights under its charter may be questioned, it may be truly said that matters in dispute under the constitution and laws of the United States arise. (*Ulster County Savings Institution agt. Fourth National Bank*, *ante*, 482.)

3. But this is not so when the federal corporation is a defendant, when its corporate life is admitted, and when the pleadings affirmatively show that the cause of action and the defense depend upon state and not Federal statutes. (*Id.*)

4. It is not enough that a party is a creation of the law of the United States to deprive the state court of jurisdiction, but *the matter in dispute* in the action must arise thereunder. (*Id.*)

5. Where, as in this case, *the matter in dispute* arises out of state and not federal laws, the state courts cannot be deprived of jurisdiction. (*Id.*)

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6. Chapter 196 of the United States Laws of 1867, providing for the removal of causes into the United States circuit courts, was not repealed by chapter 187 of the Laws of 1875. (*Wickham* agt. *Wickham*, 20 *Hun*, 239.)

REPLEVIN.

1. Where a defendant desires to reclaim chattels replevied he must serve upon the sheriff written notice that he requires the return thereof; and he must file an affidavit that he is the owner of the property, or that he is lawfully entitled to the possession thereof. (*Teechner* agt. *Deveron*, *ante*, 467.)
2. These conditions are *mandatory*, and the failure of a defendant to comply with them renders his counter-bond nugatory. (*Id.*)
3. A wife who has left her husband without good cause, and is living separate and apart from him, may maintain an action of replevin against him to recover articles of personal property belonging to her, which were left and remained in his house and possession. (*Howland* agt. *Howland*, 20 *Hun*, 472.)

RES ADJUDICATA.

1. *Res adjudicata* has no proper application on demurrer to an amended complaint where the amendment is material and the pleading essentially different by reason of the amendment. Such amendment relieves the question from being *res adjudicata*, and the complaint is tested as to its sufficiency or insufficiency by the rules of pleading otherwise applicable. (*Clegg* agt. *American Newspaper Union*, *ante*, 122.)
2. Where a complaint, based upon an alleged agreement between plaintiff and defendants, omitted to set out the agreement in full,

was held good on demurrer at first, but afterwards the complaint was amended voluntarily, giving the agreement in full, and the portion of the agreement omitted in the original complaint and included in the amended complaint, consists of a condition precedent to be performed by plaintiff before any obligation of defendants arises, and the complaint so amended fails to allege performance of such condition precedent, or tender or waiver of performance:

Held, the objection based upon the absence of an averment of the performance of the condition precedent is well taken; and *res adjudicata*, though it might have been available to defendants in answer to a demurrer had the amended complaint been based upon the contract as originally set forth, is not available as the complaint stands by reason of the presence of the precedent condition not shown to have been performed. (*Id.*)

3. The principle of the rule as to *res adjudicata* (except in cases of mere motions incidental to an action) has no reference to the form or the object of the litigation in which the particular fact is determined which is thenceforth to be deemed established as between the parties to the dispute. The form or object of the prior litigation does not alter the conclusive effect of the judgment or decision. (*Matter of Roberts*, *ante*, 136.)

REVIVOR.

1. When, during the pendency of an action in the marine court of the city of New York, the defendant dies, that court may direct the action to be revived and continued against his executors or administrators, and this notwithstanding the fact that the said court would have had no original jurisdiction against such representatives in the

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first instance. (*People ex rel. Egan* agt. *Justices of the Marine Court*, ante, 418.)

2. *Overruling same case in 18 Hun*, 838. (*Id.*)

RIGHT OF WAY.

1. In an action brought to prevent an interference by the defendant with the plaintiffs' alleged right to use a road or way across the premises of the defendant, and to compel the defendant to remove obstructions placed by him upon said way to prevent its use by the plaintiffs:

Held, that, as plaintiffs' damages by reason of being deprived of the use of the way would be difficult of estimation in dollars and cents, and as the claimed right to its use by the one party and its denial by the other will be productive of many actions, unless settled by this suit, upon these two well-understood grounds of equitable relief, as well as that of the affirmative relief sought, that the defendant be compelled to remove a cause of continuing injury, the action is maintainable, provided the plaintiffs are entitled to use the road as they insist they are.

Held, that the plaintiffs have a right of way across the defendant's premises, because: *First*. When the deeds from Frederic Schmidt to the grantors of both parties were given on April 11, 1774, there was a road upon the ground crossing their premises. That road, thus established and used was an appurtenant to the property conveyed by Frederic Schmidt and passed to the grantees therein under the clause which conveys "ways, passages, easements," &c., &c., to the premises belonging "or in any wise appertaining, or therewith used, held, occupied or enjoyed, or reputed, deemed or esteemed as part, parcel or member thereof;" and even without this clause the right to use the way

would have passed as an appurtenant to the property conveyed. *Second*. The reservation of a right of way to Spawn and Berger was an easement in their favor. The fee of the land of the road was conveyed to the grantors of the parties to this action. Each parcel bore half of the burden of the road, and if it was located more on one than on the other, compensation was made in land. This arrangement and location gives to them a joint right of use as tenants in common of the property, a right exercised by both for a period of more than fifty years, and which use is highly important, not only to show that the construction given by the court to the deed was identical with that given to it by the parties from the earliest recollections of living witnesses, but also to establish a way by use. *Third*. The right of way would also pass as an appurtenant to the property conveyed to the grantors of both parties, not only because it was a way established by grants made to Spawn and Berger, and to Paulus Schmidt in 1762, but also because the conveyances to the grantors of the parties to this suit located a road upon the ground the burden of which the properties equally sustain. (*Longendyck* agt. *Anderson*, ante, 1.)

2. Where a right of way exists in favor of plaintiffs by grant, such right cannot be lost by mere non-user. Nor could it be surrendered by verbal declarations and loose conversations, for an interest in land created by deed cannot thus be extinguished. (*Id.*)
3. Where the evidence showed the use of a road or way for a period of more than fifty years, the defendant and his grantors during that period having used the way where it passes over plaintiffs' land, and the plaintiffs and their grantors have used it over the lands of the defendant for an equal period:

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Held, that mere words of defendant would not amount to acts interrupting the use, and thus used it became a way by prescription. (*Id.*)

REVIVAL OF ACTION.

1. Section 757 of the Code of Civil Procedure, as amended by chapter 542 of 1879, providing that "in case of the death of a sole plaintiff or a sole defendant, if the cause of action survives or continues the court must, upon a motion, allow or compel the action to be continued by or against his representatives or successors in interest," is only applicable to the case where there is a sole plaintiff or sole defendant. (*Cot* agt. *Campbell*, 20 *Hun*, 50.)

RULE 2.

1. Notice of judgment is insufficient to limit the time to appeal, where the office address or place of business of the attorney is not stated as required by the rules (*Supreme Court, Rule 2*). (*Kilmer* agt. *Hathorn*, 78 *N. Y.*, 229.)

RULE 87.

1. A motion by a judgment-debtor to set aside the judgment on the ground that he was, at the time of its entry, an infant, and that no guardian *ad litem* had been appointed for him, is not based upon a mere irregularity, but upon an error in fact, and it is therefore unnecessary to specify the error in the notice of motion, as required by rule 87 in those cases in which the motion is based upon an irregularity. (*Peck* agt. *Coler*, 20 *Hun*, 584.)

RULE 89.

1. When affidavit upon which order for the examination of the plaintiff

is obtained, does not comply with the requirements of. (*See Robertson* agt. *Russell*, 20 *Hun*, 243.)

SATISFACTION.

1. After the satisfaction of a judgment in favor of plaintiff, it is within the discretion of the court to vacate it and to amend the complaint by adding new causes of action, although by so doing the statute of limitations is avoided. (*Hatch* agt. *Centl. Nat. Bk.*, 78 *N. Y.*, 487.)

SAVINGS BANKS.

1. Where a loan is made by a savings bank to three persons of \$20,000, \$15,000 and \$15,000, respectively, upon a promissory note by each for the amount he received, with collateral security of promissory notes of a foreign corporation, which notes are secured by trust deeds of such corporation upon unimproved vacant lots without the state, not worth over \$10,000; and where one of the trustees of the bank at the time of the loan was a large stockholder in said corporation, and the loans were intended to be and were in fact loans to the corporation; such facts being known to the trustees of the bank, or could with reasonable diligence have been learned by them; and where the loans were intended to be to said trustee, and were made because of his interest in the corporation, and the loans were in fact loans upon the security of the lots:

Held, that, under the laws of this state affecting savings banks, such transaction is unauthorized and illegal, and a demurrer to the complaint alleging these facts, in an action to hold the trustees personally liable, will not be sustained.

Held, further, that the persons to whom the loans are charged to have been made are not necessary parties defendant.

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Held, also, that the legal personal representatives of a deceased trustee are properly joined with the surviving trustee. (*Paine* agt. *Barnum et al.*, *ante*, 803.)

2. Where a savings bank in the city of New York purchases from a trustee of such bank bonds and mortgages owned by him, aggregating \$32,000, made by one person upon unproductive property in the city of Brooklyn of uncertain value, not worth twice the value of the mortgages, such transaction is *ultra vires*. (*Paine* agt. *Irwin*, *ante*, 816.)

3. A transaction entered upon the books of a savings bank, although made by the bank officers, is presumed to have been done with the knowledge and assent of the trustees, who are responsible for the acts of the officers whom they place and retain in position. (*Paine* agt. *Mead et al.*, *ante*, 818.)

4. Trustees of a savings bank are liable for damages caused by their misconduct in the management of the affairs of the bank. (*Hun* agt. *Cary et al.*, *ante*, 426.)

5. Where the proof showed that the bank was substantially insolvent, owing its depositors over \$70,000, and its assets were entirely insufficient in amount and in an unsatisfactory shape to meet any sudden or unusual call. In this condition of affairs the trustees authorized the purchase of four lots, at the cost of \$74,500, obligating themselves to build a building on one of the lots to cost \$25,000:

Held, that such a state of affairs justified a finding by the jury that this was not a case of mere error or mistake of judgment on the part of the trustees, but that it was a case of improvidence, of reckless, unreasonable extravagance, in which the trustees failed in that measure of reasonable prudence, care and skill which the

law requires, and imposes liability upon them for loss thereby occasioned. (*Id.*)

6. Certain of the defendants pleaded a discharge in bankruptcy:

Held, that they were not relieved thereby. The cause of action was for unliquidated damages arising solely from a tort. Such a claim is not provable against the bankrupt estate. (*Id.*)

7. As to one of the defendants, Philip Smith, there was no evidence, other than the minutes, of his attendance at the meeting which authorized the purchase; he, himself, denied such attendance in the most positive terms and asserted his entire ignorance of the transaction until after it was closed:

Held, that this entitled him to a dismissal of the complaint, that he was not liable because of his subsequent inaction. (*Id.*)

8. The relation existing between the corporation and its trustees is mainly that of principal and agent; and the relation between the trustees and depositors is similar to that of trustee and *cestui que trust*. (*Hun* agt. *Cary et al.*, *ante*, 429.)

9. The trustees are bound to observe the limits placed upon their powers in the charter, and if they transcend such limits and cause damage they incur liability. If they act fraudulently or do a willful wrong, they may be held for all the damage they may cause the bank or its depositors. But if they act in good faith within the limits of powers conferred, using proper prudence and diligence, they are not responsible for mere mistakes or errors of judgment. (*Id.*)

10. When one deposits money in a savings bank, or takes stock in a corporation, thus divesting himself of the immediate control of his property, he expects, and has

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the right to expect, that the trustees or directors who are chosen to take his place in the management and control of his property will exercise ordinary care and prudence in the trust committed to them — the same degree of care and prudence that men prompted by self-interest generally exercise in their own affairs. When one voluntarily takes the position of trustee or director of a corporation, good faith, exact justice and public policy unite in requiring of him such degree of care and prudence, and it is a gross breach of duty, *crassa negligentia*, not to bestow them. (*Id.*)

11. A trustee is bound not only to exercise proper care and diligence, but ordinary skill and judgment. As he is bound to exercise ordinary skill and judgment, he cannot set up that he did not possess them. When damage is caused by his want of judgment, he cannot excuse himself by alleging his gross ignorance. One who voluntarily takes the position of director or trustee and invites confidence in that relation, undertakes with those whom he represents, or for whom he acts, that he possesses at least ordinary knowledge and skill, and that he will bring them to bear in the discharge of his duties. Such is the rule applicable to public officers, to professional men and to mechanics, and such is the rule which must be applicable to every person who undertakes to act for another in a situation or employment requiring skill and knowledge; and it matters not that the service is to be rendered gratuitously. (*Id.*)

12. The facts of this case examined; and, *held*, that the evidence justified a finding by the jury that this was not a case of mere error or mistake of judgment on the part of the trustees, but that it was a case of improvidence, of reckless, unreasonable extravagance, in

which the trustees failed in that measure of reasonable prudence, care and skill which the law requires. (*Id.*)

13. The receiver represents the bank, and may maintain any action the bank could have maintained. The trustees may be treated as agents of the bank, and for any misfeasance or nonfeasance causing damage to the bank they are responsible to it, upon the same principle that any agent is for like cause responsible to his principal. An action of this character is properly tried as an action at law.

14. In actions *ex delictu* the plaintiff may sue one or all the wrongdoers; and the objection that others should have been joined as defendants cannot prevail. (*Id.*)

15. Where two of the trustees, who were made defendants in this action, filed petitions for their discharge in bankruptcy after the commencement of this action and were discharged before judgment:

Held, that the discharge furnished no defense; the claim was purely for unliquidated damages occasioned by a tort. Such a claim is not provable in bankruptcy and, therefore, was not discharged (*Affirming S. C., ante, 421*). (*Id.*)

SERVICE.

1. The proceeding provided for by section 875 of the Code of Procedure to bind a joint debtor not originally summoned is a special statutory proceeding, and a party defendant is entitled to twenty days' notice, and this although the suit be in the marine court. (*Kernochan agt. Bland, ante, 97.*)

2. In this action, brought against a domestic corporation, which had appeared by an attorney, and served an answer, an order requiring it to allow the plaintiff to inspect its books, or show cause

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at a time and place therein specified, was made and served upon its attorney.

The order having been made absolute on the return day against the opposition of the defendant, a copy thereof was served on its attorney. Upon proof of such service, and of the defendant's refusal to obey the order, an order to show cause why defendant's answer should not be stricken out was made and also served upon the said attorney.

Upon an appeal from an order striking out the answer, *held*, that under section 799 of the Code of Civil Procedure, the orders to show cause were properly served upon the defendant's attorney, and that it was not necessary to serve them upon any of its officers. (*Rosner* agt. *New York Museum Association*, 20 *Hun*, 182.)

8. An order requiring a party to an action to appear for examination before trial, under the provisions of the Code of Civil Procedure (*new Code*, sec. 870, *et seq.*), must be served personally upon him; a service on his attorney is not sufficient to give the court jurisdiction to punish him for not obeying the order. (*Tobo* agt. *Baker*, 77 *N. Y.*, 30.)

SET OFF.

1. Between April 25, 1870, and December 12, 1871, the Transcript Association, under proper employment, did printing for the county of New York, reasonably worth the sum of \$30,956.85, and, under like employment, between May 1, 1871, and January 1, 1872, did printing for the city of New York which was reasonably worth the sum of \$13,605.40. The claims were assigned to the plaintiffs in January, 1872.

In this action, brought against the city of New York to recover the said amounts, the city inter-

posed a set-off, founded on the fact that in the year 1869, and in January, 1870, the said association received from the city sums amounting in the aggregate to \$117,419.99 for arrearages for advertising for the city government, and for a claim for advertising for the common council, as adjusted by the comptroller under chapter 858 of 1868, and that in said amount there was a gross overcharge which had been fraudulently presented, passed upon and obtained:

Held, that the set-off was a proper one, and that the defendant was entitled to interpose it as against the plaintiffs claiming as assignees of the said association. (*Taylor* agt. *Mayor*, 20 *Hun*, 292.)

2. That chapter 804 of 1874, imposing upon the city of New York the payment of county charges, transferred to the city all existing equities, set-offs and defenses that could be interposed to such charges either by the city or county at the time it was passed. (*Id.*)
3. The failure to present a claim to the comptroller of New York city before suit thereon affects the remedy only; such presentation does not in any way determine the existence of, or create the debt. (*Id.*)
4. In an action by a principal to recover the price of goods, sold for him by an agent or factor who did not disclose his principal, the purchaser may set off a debt due to him from such agent or factor, unless he knew at the time that his vendor was acting as an agent or factor, or unless circumstances were brought to his knowledge which would necessarily put him on inquiry in regard thereto. Mere public rumor or knowledge possessed by others in regard to that fact will not deprive him of his right of set-off. (*Pratt* agt. *Collins*, 20 *Hun*, 126.)

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SHERIFF.

1. By the failure of the original sureties to justify, the defendant, as sheriff, became liable as bail, and as such had the right to be exonerated on surrendering the defendant to the jail before the expiration of the time to answer in the action against himself. (*Douglas agt. Haberstro, ante, 194.*)
2. The special term has power to grant him such further time, after answer, as it deems just, to make such surrender. But to entitle the sheriff to such relief, after the time for answering has expired, it is incumbent on him to show a substantial and sufficient excuse for permitting the defendant in the execution to be at large. (*Id.*)
3. What is not a substantial and sufficient excuse considered. (*Id.*)
4. In an action against a sheriff to recover for alleged false returns of several executions, the mere issuing of a prior execution is no defense in itself, nor can the sheriff stultify his own return so as to justify under another execution which he has also returned unsatisfied. (*Johnson Bros. & Co. agt. Reilly, ante, 854.*)
5. It matters not how many executions the sheriff may have had, unless there is some averment showing that they affected the plaintiff's execution. (*Id.*)
6. It seems, that a seizure and levy by a sheriff, under an attachment or execution against one person, upon the entire property of a firm, as the sole property of the debtor, is not justified by showing that the debtor has an interest in the property as a co-partner. (*Atkins agt. Saaton, 77 N. Y., 195.*)
7. The power of the sheriff, for the purpose of rendering the levy upon the interest of one partner in the co-partnership property effect-

ual, to take possession of the whole property, is merely incidental to the right to reach the debtor's interest; and is to be exercised as far as possible in harmony with, not in hostility to, the rights of the other partners. (*Id.*)

8. When, therefore, the sheriff exceeds this limit, and, instead of levying on the debtor's interest, levies upon and seizes the property, as the sole property of the debtor, he is a trespasser. (*Id.*)
9. In an action against a sheriff to recover the possession of certain property, defendant justified under two attachments against B.; the property formerly belonged to a firm composed of plaintiff and B. Plaintiff's evidence was to the effect that, prior to the seizure, the co-partnership was dissolved and the personal property divided between the partners; that B. sold his portion to third persons, and all had been removed, save a small portion left by one of the purchasers in plaintiff's care. Defendant seized all the goods of the late firm in plaintiff's possession, as the sole property of B. Defendant conceded the partnership, but controverted the dissolution and division. The court charged that if the jury believed there was a nominal assignment by B., of his interest in the property seized, to plaintiff with intent to defraud B.'s creditors, and with knowledge on plaintiff's part, then the property was liable to the attachments: *Held, error.* (*Id.*)

SHERIFF'S SALE.

1. Though the court will not set aside a sale of land on execution, and order a resale, because plaintiff's agent bid less for it than he was instructed to bid by his principal, yet where the purchase at the sale is by the plaintiff, who is a receiver appointed by the court, charged with the duty of applying

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the property of the debtor to the payment of his debts, and the purchase is made for the receiver's individual benefit, the court will not tolerate such act on his part. (*Sheldon* agt. *Saens et al.*, ante, 877.)

SPECIAL PROCEEDINGS.

1. An application to enforce the liability imposed by the statute (2 R. S., § 19, sec. 44), declaring an assignee of the cause of action, or one beneficially interested in the recovery, liable for the costs of an action, brought by him in the name of another, is a special proceeding; and, under the provisions of the act of 1854 (sec. 8, chap. 270, *Laws of 1854*), in reference to such proceedings, costs are allowable therein. (*Marvin* agt. *Marvin*, 78 N. Y., 541.)
2. A proceeding under the act of 1858 (chap. 888, *Laws of 1858*), to vacate an assessment in the city of New York, at least when instituted at special term, is a special proceeding within the meaning of the act of 1854 (chap. 270, *Laws of 1854*), authorizing the allowance of costs in such proceedings. (*In re Jettier*, 78 N. Y., 601.)
3. It seems, that the distinction between proceedings instituted at special term and those commenced before a judge at chambers, is disregarded in the Code of Civil Procedure (secs. 1856, 1857). (*Id.*)

SPECIFIC PERFORMANCE.

1. Where, in an action for the specific performance of a contract between the plaintiff and defendant for the sale and exchange of certain real estate, it appeared that the plaintiff was the owner in fee of the premises 437 West Thirty-ninth street, and assumed to convey the premises 412 West Fortieth street as executrix under

the will of John M. Mayer; in said will the testator first directs the payment of his debts and then devises the premises last named to his wife, the plaintiff, for life or during widowhood, upon her death or remarriage the said premises were devised in fee to his surviving children or their issue. Full power was given to the plaintiff as such executrix at any time and on such terms as she might think satisfactory to sell, mortgage or lease the whole or any part of the testator's real estate, and to invest the proceeds of such sale in good and safe securities or purchase other real estate, to sell the said securities and real estate so secured or purchased, and to continue the said transfer or disposition of the real estate of said testator or the proceeds thereof as long, and to repeat the said operations as often as said executrix might think best and proper; provided, however, that the proceeds of such sale or other disposition of said real estate shall be considered real estate. It further appeared that a judgment had been recorded against the plaintiff, as executrix, as aforesaid, in an action commenced against the said John M. Mayer, deceased, in his lifetime, in whose place and stead the said executrix was substituted as defendant *pendente lite*. It was conceded that this judgment is still unpaid, and that the personal property of the deceased, in the hands of said executrix, does not exceed the sum of \$150:

Held, that the objection that the plaintiff had no power to exchange the Fortieth street property is untenable. It would seem a fair and rational construction of a power as broad in its terms as the one contained in the will, to hold that it would authorize a direct exchange which would accomplish the result of a sale, and a purchase of other realty in a single transaction and carry into effect the obvious intention of the testator:

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Held, also, that the objection that plaintiff cannot give a warranty deed or sell the property in fee simple is equally untenable. She could certainly give a valid title under the power in the will and, if she saw fit, could give her personal warranty of the title. (*Mayer agt. McCune, ante, 78.*)

2. A purchaser has no right to expect from an executrix anything more than a covenant against her own acts, but if she contracts to give a covenant of warranty, and actually executes it, the covenant will be valid and she will be bound thereby:

Held, further, that the objection that her testator's indebtedness for the judgment, was an incumbrance and lien on the property for which it could be sold by creditors at any time within three years from November 7, 1877, to pay his debts is fatal to the action for specific performance. (*Id.*)

3. The power of sale in the will is not expressly for the purpose of paying debts and legacies. It does not even sanction the conversion of the real estate into personalty. It authorizes the executrix to reinvest the proceeds of the real estate at her pleasure and in her discretion; provided, however, that said proceeds, whatever the form they may assume, shall always remain realty, thus specially withholding the character of a personal fund accessible to creditors. Such proceeds could be followed only in equity, and, under the circumstances, it would seem that no bar or hindrance would exist to a creditor's application for a resale of the premises. (*Id.*)

4. Equity will not aid an effort to impair or destroy the legal remedies of creditors or sanction an attempt on the part of an executrix to vest individually in herself and mingle with her own property, real estate which, until

her testator's debts are paid, is chargeable with a trust. (*Id.*)

.STATUTE OF LIMITATIONS.

1. Under subdivision 5 of section 91 of the old Code, "an action for criminal conversation, or for any other injury to the person or rights of another, not arising on contract and not hereinafter enumerated," might be brought within six years. By chapter 431 of 1876 (passed May twenty-sixth of that year), there was added to section 94 of the Code, prescribing the actions which must be brought within one year, a second subdivision, as follows, viz.: "An action for injury to the person." It was provided therein that the act should take effect July 1, 1876.

This action was commenced by the plaintiff on July 23, 1877, to recover damages for an injury sustained on November 22, 1872, occasioned by his stumbling over an obstruction on a sidewalk in the city of Kingston, alleged to have been negligently suffered to remain there by the defendant:

Held, that since the amendment of 1876, an action for injury to the person such as the present one must be brought within one year from the time the accident occurred.

That the amended act was applicable to the plaintiff's case, and that no action could be maintained by him after July 1, 1877. (*Dubois agt. City of Kingston, 20 Hun, 500.*)

2. The provision of the Code of Procedure (*old Code, sec. 99, sub. 2*), declaring that an action shall be deemed commenced, within the meaning of the statute of limitations, when the summons is delivered to the sheriff or other officer with intent that it shall actually be served, applied only to defendants who were parties to the action at the time of such delivery, or who were made parties

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before the statute had run against the claim upon which the action was brought. (*Shaw* agt. *Cock*, 78 N. Y., 194.)

3. Such delivery of the summons did not prevent the running of the statute in favor of persons who, although liable upon the obligation sued upon, were not named as defendants in the summons; and it is immaterial whether the omission was by design or through ignorance, mistake or inadvertence. (*Id.*)

4. So, also, where by order amending the summons a new party defendant was brought in, the suit was only commenced as to him when thus brought in; and if between the time of the commencement of the action as to the original parties, and the time when the new defendant was brought in, the period of limitation had expired, a plea of the statute in bar of his liability is good. (*Id.*)

5. After the satisfaction of a judgment in favor of plaintiff, it is within the discretion of the court to vacate it and to amend the complaint by adding new causes of action, although by so doing the statute of limitations is avoided. (*Hatch* agt. *Central Nat. Bk.*, 78 N. Y., 487.)

STAY OF PROCEEDINGS.

1. A stay of proceedings will be granted to enable a party to review an order denying an application to make a pleading more definite and certain. (*Brinkerhoff* agt. *Perry*, *ante*, 155.)
2. Where, in respect to the original pleading, the general term entertained an appeal from an order of special term denying an application to compel plaintiff to amend by making more definite and cer-

tain, and ordered that the complaint be so amended:

Held, the presumption is that such appeal was properly entertained, and that the general term will entertain a second appeal in the same case. (*Id.*)

3. A stay of proceedings upon judgment of foreclosure, pending appeal to the general term, is discretionary and plaintiff is not entitled as matter of right to a deficiency undertaking. Where the foreclosure is upon leasehold premises, and "there is a receivership for application of the rents, the discretion granting a stay was fairly exercised. (*Wilson* agt. *Grant*, *ante*, 850.)

STILWELL ACT.

1. Where a defendant has, before the entry of judgment in an action, been arrested and held to bail under an order of arrest, which order has not been vacated, and where the defendant has not been discharged therefrom, nor his bail exonerated, the plaintiff cannot, after the entry of judgment, procure his arrest for the same offense, upon a warrant issued under and by virtue of the Stilwell act. (*Townsend* agt. *Nebenzahl*, 20 Hun, 81.)

STIPULATION.

1. Where judgment absolute was rendered against a defendant in accordance with his stipulation, given on appeal from an order granting to plaintiff a new trial, and a reference was ordered to ascertain the amount due to the plaintiff, the referee reporting that nothing was due to the plaintiff, but that there was a sum due to the defendant on his counterclaim:
Held, that the defendant's right to affirmative relief was lost by

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the judgment rendered on his stipulation, and that he could not enter judgment for the amount found due him. (*See The People* agt. *Denison*, ante, 157.) (*Rust* agt. *Hauselt*, ante, 389.)

2. An oral agreement between the parties to an action on trial before a referee, entered by a stenographer upon his minutes, leaving it to the referee to fix his own compensation, is not an agreement in writing by the parties for another rate of compensation than that prescribed, such as is authorized by the provision of the Code of Procedure (*old Code*, sec. 318) regulating referees' fees. (*First Nat. Bank of C.* agt. *Tomajo*, 77 N. Y., 476.)

3. If such an agreement can be considered one in writing, it is not binding as it does not fix any rate of compensation. (*Id.*)

4. The cases holding that oral agreements between parties or their attorneys, made in open court, in respect to matters connected with the litigation, are binding and will be enforced, have no application to such an agreement, as it has reference to a matter wholly collateral to the litigation which is regulated by statute. (*Id.*)

See ARREST.

Mayer agt. *Rothschild*, ante, 510.

STREETS AND SIDEWALKS.

1. Streets which include sidewalks are for the use of the public at large. Any obstruction erected on the streets or sidewalks without the sanction of the legislature is a nuisance. (*Elly* agt. *Campbell*, ante, 383.)
2. A local municipal corporation cannot give a valid permission to any one to occupy the streets or sidewalks with continuing erections or other obstructions with-

out express power conferred by statute. (*Id.*)

3. The municipal legislature of the city of New York has no power to authorize the occupation of the streets and sidewalks, in the neighborhood of the markets, with stands and booths to be kept and maintained continuously at all hours of the day. (*Id.*)
4. It is the duty of the commissioner of public works to remove all illegal obstructions placed upon the streets and sidewalks. (*Id.*)

SUMMARY PROCEEDINGS.

1. The acceptance of a chattel mortgage postponing the payment of past due installments of rent upon a lease, and securing the payment of the subsequent installments of rent as they mature, does not prevent the lessor from maintaining summary or other proceedings founded on a default in the payment of the subsequently accrued installments. (*The People ex rel. Beattie* agt. *McAdam*, ante, 19.)
2. In summary proceedings to recover the possession of real property, a landlord being a non-resident, but owning property in the city and county of New York, cannot be required to file security for costs. (*Hasler* agt. *Johnson*, ante, 432.)
3. This proceeding is not "such a special proceeding instituted in a court of record" as is contemplated by section 3279 of the Code of Civil Procedure. (*Id.*)
4. Summary proceedings under the statutes to recover the possession of lands, &c., commenced before one marine court justice may be continued before another by consent of the parties. (*People ex rel. Jackson* agt. *McAdam*, ante, 465.)
5. Where a tenant knowingly sublets a portion of the demised premises

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- for a policy shop, the lease of the tenant may be annulled by the landlord, and the tenant may, under the statute in reference to illegal trades, be removed by summary proceedings, the same as if he were an overholding tenant. (*Shaw* agt. *McCarty*, ante, 487.)
6. After the forfeiture has once attached, it cannot be discharged by the tenant abating the nuisance. The reasons stated. (*Id.*)
7. Where summary proceedings are instituted in one of the district courts of the city of New York, to dispossess a tenant for non-payment of rent, it is not necessary to state in the summons that the premises are situate within the judicial district in which the said proceedings are instituted. (*People ex rel. Duchardt* agt. *Kelly*, 20 *Hun*, 549.)
8. Although where the premises are described in the landlord's affidavit as situated on a certain street, which said street lies wholly within the statutory boundaries of one of the judicial districts of the city of New York, the court will take judicial notice of the fact that such premises are situated within such district; yet, where they are described by the street and number, and such street extends through two or more judicial districts, the court will not, from the number of the house, determine its position upon the said street, and will not, therefore, take judicial cognizance of the judicial district within which it is situated. (*Id.*)
9. How far a party is bound by an implied concession of the existence of a fact. (*Id.*)
10. The court will only restrain the dispossession of a tenant, under a warrant in summary proceedings, in cases of fraud, surprise, or undue advantage in the actual conduct of the proceedings. (*Armstrong* agt. *Cummings*, 20 *Hun*, 313.)
11. The court will take judicial notice that premises described by the street on which they are situated are within a certain judicial district where the entire street is within the statutory boundaries of such district. (*Id.*)
12. The provisions of the Revised Statutes authorizing the dispossession of a tenant by summary proceedings, for non-payment of rent, are applicable to a lessee of a furnished house at a gross rent; the furniture in such a case is but an incident, and the rent issues out of the land only. (*Id.*)

SUMMONS.

1. A summons or notice to the defendant for the commencement of a suit is certainly process quite as much as a *capias* or a subpoena to appear and answer is process, and must be issued by the court under its seal. (*Dwight* agt. *Merritt*, ante, 820.)
2. A summons signed by an attorney, but not under the seal of the court, is not such process as is intended by the statute. (*Id.*)
3. The power to amend the process given by sections 948 and 954 of the United States Revised Statutes is power to amend a want of form in process, but does not apply to a summons in this form. There must first be a process to be amended; and a summons issued in this manner is no process. (*Id.*)
4. Where the defendant, residing in another district, is enticed and induced to come into the district where the plaintiff resides by the false representations or deceptive contrivances of the plaintiff, or of any one acting in his behalf, for the purpose of serving legal pro-

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cess upon him, and the same is served through such improper means, such service is illegal and ought to be set aside and the process should be dismissed. (*Steiger* agt. *Bonn*, ante, 496.)

5. Where the defendant had been brought from New York to Newark, New Jersey, by a forged telegram, and on his arrival he was served with the summons or writ by the Deputy United States Marshal, who had been engaged by plaintiff to make such service:

Held, that although there is no pretense that the deputy marshal had any knowledge of the forged telegram, yet the undisputed facts make such a presumption against the plaintiff or his agent, who accompanied the officer, that he is called upon to rebut them with proof that he was not privy to the deception practiced upon the defendant. (*Id.*)

SUPPLEMENTARY PROCEEDINGS.

1. In order to examine a non-resident of the county upon supplementary proceedings, it must appear that the defendant has within the city an office for the regular transaction of business in person, as contradistinguished from cases where he transacts the same through agents. (*Brown* agt. *Gump et al.*, ante, 507.)

See PRACTICE.

Wilcox agt. *Harris*, ante, 262.

2. Where a judgment creditor was entitled, at the time of his death, to institute supplementary proceedings against his debtor, the right conferred by section 283 of the Code upon his personal representative to institute and enforce such proceedings was not taken from them by the subsequent repeal of said section by subdivision 8 of section 1 of chapter 417 of

the Laws of 1877, but such right was preserved and continued in full force by the qualification of such repeal contained in section 8 of the said act. (*Pardee* agt. *Tilton*, 20 *Hun*, 76.)

3. A judgment creditor is not permitted to harrass his debtor by successive examinations in supplementary proceedings; after he has once fully examined him, a second order will not be granted, unless some good reason be given therefor, even though the second application be founded upon another judgment held by the same creditor against the same debtor. (*Canavan* agt. *McAndrew*, 20 *Hun*, 46.)

4. A receiver, appointed in proceedings supplementary to execution, cannot maintain an action to enforce the trust created by the Revised Statutes (1 *R. S.*, 738, sec. 52), in favor of the creditors of one paying the consideration for lands which are conveyed to another. (*Underwood* agt. *Sutcliffe*, 77 *N. Y.*, 58.)

5. The judgment debtor has no interest, legal or equitable, in lands paid for by him but conveyed to another (sec. 51), and the creditor derives no right through him; if a creditor at the time of the conveyance, he has simply an interest created by the statute as *cestui que trust*; the trust does not vest in the receiver, and he is not the representative of the creditor in respect to it. (*Id.*)

6. Where a receiver has been appointed in proceedings supplementary to execution instituted in favor of one judgment creditor, in an action brought by another judgment creditor, to set aside such proceedings on the ground of collusion, it is in the discretion of the court to appoint another receiver, and to direct the first receiver to hand over to him the property

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received. (*Connolly agt. Krets*, 78 N. Y., 620.)

SUPREME COURT.

1. The supreme court at chambers or a county judge has not jurisdiction to grant a writ of *habeas corpus* upon the application of a wife, living in a state of separation from her husband, respecting the custody of a minor child. (*The People ex rel. Ward agt. Ward*, ante, 174.)
2. The writ is founded upon 8 Revised Statutes (*Banks' 6th ed.*, page 163), and the application must be made to the *supreme court*, and it must be not only granted by, but returnable before the *supreme court*. (*Id.*)

SURETIES.

1. A *surety*, upon an undertaking given on an appeal to the court of appeals pursuant to section 1826 of the Code of Civil Procedure, who is engaged in the milling business, and who rents and occupies a mill within the state and owns the machinery therein, is to be deemed a "householder," within the meaning of section 812 of the Code of Civil Procedure, and is sufficient for the purpose of the undertaking. (*Delamater et al. agt. Byrne*, ante, 71.)
2. Where justification of sureties on appeal to the court of appeals has been inadvertently adjourned "out of court," the appellant has no such "fixed right" to sue on the undertaking to the general term as prevents the court from directing the new bond to be filed *nunc pro tunc*. (*Hardt et al. agt. Schuling*, ante, 853.)

SURROGATES.

1. Chapter 894 of the Laws of 1870, entitled "An act to confer addi-

tional powers upon surrogates and to authorize an examination as to the effects of deceased persons," is unconstitutional, inasmuch as sections 5 and 6 thereof are clearly unconstitutional and the act indivisible. (*Matter of Rosenthal*, ante, 837.)

TENANTS IN COMMON.

1. Henry Huntington died in 1846, leaving a will whereby he gave to his daughter, Henrietta D. Wright, the use or income of a certain share of his real and personal property, to have and to hold for her life, and at her decease the said share was to go absolutely to her heirs. The said Henrietta D. Wright died in 1865 leaving two children, to wit, the plaintiff and the defendant Wright. By the will of their grandfather the executors and trustees were empowered to sell, convey and pay over and transfer to the different devisees their share or portion. These children took equally, share and share alike. In 1866 and 1868 the executors transferred real and personal property to the plaintiff and defendant Wright, jointly. B. N. Huntington was the acting trustee and executor. Some seven or eight years ago accounting proceedings were had and it was found that there was still coming to plaintiff and defendant Wright from their grandfather's estate \$190,000. The said executor, B. N. Huntington, made an assignment for the benefit of creditors in 1876, and a large portion of the property so assigned by him comprised the property of the grandfather's estate. All of this property, both real and personal (with some exceptions of minor importance), was transferred by B. N. Huntington's assignee to the plaintiff and defendant Wright, jointly, in part payment of what was still coming to them under the will. The defendant Wright, from time to time, received the proceeds

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from the joint sales of the property, which came to him and plaintiff as tenants in common from their grandfather's estate, and from the bonds, mortgages and contracts, the plaintiff uniting in the deeds, and in some instances uniting with the defendant in satisfying mortgages that had been paid to the defendant Wright, but it was agreed between the parties that the defendant should account to the plaintiff on final settlement for all the moneys received by him from this property held by them as tenants in common, and that when they received what they could from the estate the plaintiff was to have her share on final settlement of the property which came to them from their grandfather's estate. The defendant Wright has received from this joint property about the sum of \$226,888, and has paid over to the plaintiff not to exceed \$9,000. There is still remaining of this property, which stands in the name of plaintiff and defendant Wright, real estate of the value of about \$95,000, and personal property, contracts, &c., to the amount of about \$10,000. On the 14th day of January, 1878, the defendant Wright made a general assignment for the benefit of creditors to the defendant Searles, who has qualified and is now acting as such assignee, and said assignee now claims to hold for the benefit of creditors one-half part of all the real and personal property now remaining in the name of plaintiff and his assignor, the defendant Wright. In an action brought by plaintiff for an accounting and to have the property undisposed of set apart to the plaintiff, or that her half of what the defendant might have disposed of be declared a lien on the legal estate of Wright or his assignee in the balance:

Held, first, that where tenants in common sell and convey property and one receives the entire purchase-money the other can maintain an action for money had

and received to recover his proportion of the price. So he can to recover his share of the rents received by the cotenant, but that will not bar his remedy for an equitable adjustment and lien.

Second. That an action of account will lie in this case. That action is in its nature equitable, although given by statute; it was before and still is a matter of equitable cognizance. It involves the idea of agency, an implied trust, and whatever remedy is appropriate in such an action can be invoked hereby by the plaintiff.

Third. That the subject of the tenancy was the undivided share of the two in the estate of their grandfather, and the fact that it was handed over to them in different parcels or by different instruments does not change the subject of the tenancy. The whole is to be considered one subject.

Fourth. That the plaintiff has an equitable lien on the share of her brother, the defendant Wright, in the balance as it now exists for her share of what her brother has received in excess of her.

Fifth. The rights of the assignee of defendant Wright are no greater than the rights of the latter would be. The assignee takes subject to all equities of third persons. (*Wright agt. Wright, ante, 176.*)

TRADE-MARK.

1. Where the case clearly shows that the plaintiffs and those through whom they claim were the first to use the word "royal" as a portion of their trade-mark in connection with flavoring extracts, and have continued its use for a considerable number of years:

Held, that, such appropriation of this word, although it is a common one, to distinguish an article produced by them, and although it is only applied to one grade of the article they manufacture, but by which distinctive appellation

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it has come to be known, dealt in and used, gives to the plaintiffs the right to its exclusive use in respect to such production, and such right will be protected. (*Royal Baking Powder Company* agt. *Sherrell et al.*, ante, 17.)

2. The plaintiffs coined the compound word "*Electro-Silicon*" and applied it to a polishing powder prepared by them from an infusorial deposit. They put up the powder in appropriate packages and acquired a large sale therefor. (*Electro-Silicon Company* agt. *Trask*, ante, 189.)

3. The defendant, with a view to imitate their preparation, prepared a powder to be used for the same purpose and put it up in packages similar to those of the plaintiff and designated it "*Electric-Silicon*" and have offered it for sale:

Held, that they should be restrained. (*Id.*)

4. An imitation of the packages, labels and manner of dressing goods of another will be restrained by injunction where the party has combined these things in such a manner as to invade the plaintiff's rights, secured by their first adoption in combination, and in a way well calculated to deceive buyers of the article. (*Electro-Silicon Company* agt. *Levy*, ante, 469.)

TRIAL.

1. In an action upon a promissory note, the defense was, in substance, that defendants purchased for plaintiff, and with her money, certain United States bonds; that she, not desiring to be known as the purchaser, they were bought in a defendant's name, and left in their hands for safe keeping, the note being given as a means of insuring the delivery of the bonds when called for, or of obtaining

a compensation therefor if they were withheld; and that the bonds were subsequently delivered to plaintiff's husband, who was her authorized agent. Upon the trial one of the defendants was allowed to testify to conversations with plaintiff's husband, who was then deceased, in one of which he requested witness to go and purchase the bonds in his own name. No authority had been shown in plaintiff's husband to act for her, and the evidence was objected to on that ground; the authority was subsequently proved, and it appeared from the record that the trial court knew that this should be established before the declarations were competent:

Held, that the objection was simply to the order of proof, which is always in the discretion of the court, and so was untenable. (*Platner* agt. *Platner*, 78 N. Y., 90.)

2. The denial of a motion to strike out incompetent evidence admitted on a jury trial without objection is not error; it may be retained in the discretion of the court; the remedy of the party is to ask for instructions to the jury to disregard it. (*Id.*)

3. Where a witness, in answering a proper question, with proper and responsive matter, testifies to something, irresponsive and incompetent, an objection does not reach it; the proper course is for the party to move to strike out the improper portion of the answer, or to ask instructions to the jury that they disregard it. (*Id.*)

4. *It seems*, that where, at the close of the evidence upon a jury trial, both parties ask the court to direct a verdict in their favor respectively, it will be assumed that they intend to waive the right of submission to the jury and consent that the court shall decide the questions of law and fact involved. (*Kochler* agt. *Adler*, 78 N. Y., 287.)

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5. But this presumption is repelled when the party whose request is denied thereupon asks to go to the jury upon the questions of fact. (*Id.*)

6. A court or jury is not bound to adopt the statements of a witness, simply for the reason that no other witness has denied them, and that the character of a witness is not impeached; the witness may be contradicted by circumstances as well as by statements of others, contrary to his own, or there may be such a degree of improbability in his statements as to deprive them of credit however positively made. (*Id.*)

7. In an action brought to recover damages for the death of the wife of a tenant who occupied rooms in the rear of a house in the city of Brooklyn, which was not provided with a fire-escape as required by the city charter (*sec. 87, § 18, chap. 868, Laws of 1868*), and which was destroyed by fire, causing such death, it appeared that if a fire-escape had been placed at the rear of the house the deceased could, and probably would, have escaped; there was no proof as to where fire escapes are usually placed, or whether the front or rear of this house would have been the most suitable place for one:

Held, that it was proper to assume, from the structure of the house and of fire-escapes, that one would probably have been placed in the rear; and that the jury were justified in finding that the deceased would have escaped had the defendant discharged his duty. (*Willy* agt. *Mulledy*, 78 N. Y., 810.)

8. Defendant had once provided a ladder to reach the scuttle in the roof, but there had been none there for many months before the fire; the evidence tended to show that the deceased knew where the scuttle was, that she had time after notice of the fire to reach it, and that, as she was making efforts

to escape, she probably tried to escape in that direction and failed for want of the ladder.

Held, that this was sufficient to authorize a verdict for plaintiff. (*Id.*)

9. In an action to recover damages for alleged negligence causing the death of plaintiff's intestate, the court refused to charge that the jury, in estimating the damages, might take into consideration the fact that plaintiff would be entitled to the property of the deceased as her next of kin:

Held, no error. (*Terry* agt. *Jewett*, 78 N. Y., 839.)

10. This action was brought by plaintiff, as assignor for the benefit of creditors of J., for the alleged conversion of goods levied on by defendant R., as sheriff, by virtue of an execution against H., in favor of the other defendants. Plaintiff gave in evidence a judgment-roll in an action brought by him against J., H. and another, to determine the title to the goods. The judgment therein determined that the title to the goods was originally in H.; that she transferred them to J. as security for money loaned by him, and that by the assignment to plaintiff he acquired J.'s interest. Defendants' answers alleged substantially that the property belonged to H. and was seized by virtue of an execution against her. Defendants offered to prove by competent legal evidence the allegations of the answer; this offer was rejected:

Held, that under the answer defendants had a right to show that the transfer to J. was as to them fraudulent and void, leaving the title in H.; that the offer was in effect to prove this, and its exclusion therefore was error. (*Raymond* agt. *Richmond*, 78 N. Y., 851.)

11. Upon the trial of an action, a party holding the affirmative of an issue is bound to introduce all the evidence upon his side before

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he closes; having rested, and the opposite side having closed, it is entirely in the discretion of the court whether to allow said party to introduce new evidence to maintain the issue, or to re-examine a witness on his part as to transactions previously testified to. (*Marshall* agt. *Davies*, 78 N. Y., 414.)

12. Where a party, as a witness to sustain an issue as to which he has the affirmative, testifies to one conversation, which is denied on the other side, he is not entitled, as a matter of right, to prove another as to which he has not previously testified, even though it tends to support his original statement. (*Id.*)

13. A defense made by way of new matter not constituting a counterclaim is deemed controverted; and plaintiff, without pleading, may traverse or avoid it, and is entitled to the benefit of every possible answer to it the same as if pleaded, for that purpose evidence, admissible under the principles of either law or equity, takes the place of pleading. (*Arthur* agt. *Homestead F. Ins. Co.*, 78 N. Y., 462.)

14. In an action to recover damages for injuries to plaintiff's horse, let by him to defendant, alleged to have been occasioned by the negligence of the latter, defendant claimed that the horse was vicious, and evidence was given on the trial, on both sides, on that question. The court charged substantially that if the damage was occasioned by a defect in the horse or harness, and would not have occurred if those defects had not existed, defendant was not responsible; also, that if the defendant or his servants were to some extent guilty of negligence, yet if the defect or default in the property did exist, and but for it the damage would not have resulted, plaintiff could not recover. Subsequently the court charged that it

was incumbent upon plaintiff to show by a preponderance of evidence that the horse was not vicious; this was excepted to:

Held, no error; that the burden of proof upon the whole case was upon plaintiff, and it was incumbent upon him to satisfy the jury by a preponderance of evidence that the injury was occasioned by defendant's negligence alone, and that he himself was free from fault contributing to it; that the character of the horse having been assailed by evidence, the burden rested upon plaintiff to sustain it, or to show that it had not contributed to the injuries. (*Hale* agt. *Smith*, 78 N. Y., 480.)

15. The court on motion, or of its own volition, may direct questions of fact in an action to be tried at circuit. (*Kelham* agt. *Durfee*, 78 N. Y., 484.)

16. A cause was moved for trial at circuit; by direction of the court it was placed on the special term calendar. The special term ordered additional parties to be brought in as parties defendant. On appeal from such order the general term reversed it and directed the cause to be placed on the circuit calendar for trial.

Held, that the general term order was not appealable; that any question as to the mode of trial, or as to parties, could and should be raised upon trial, and an exception taken, to be heard on appeal from judgment. (*Id.*)

UNDERTAKING.

1. A *surety*, upon an undertaking given on an appeal to the court of appeals, pursuant to section 1326 of the Code of Civil Procedure, who is engaged in the milling business, and who rents and occupies a mill within the state and owns the machinery therein, is to be deemed a "householder," within the meaning of section 812 of

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the Code of Civil Procedure, and is sufficient for the purpose of the undertaking. (*Delamater et al. agt. Byrne, ante, 71.*)

2. A plea of former suit pending was interposed in an action upon an undertaking given on appeal. It appeared that a former action had been brought, the complaint in which omitted to allege that notice of judgment had been served as required by the Code of Procedure (*old Code, sec. 848*); the complaint was demurred to and demurrer sustained because of this omission; and before the commencement of the second action the former suit had proceeded to final judgment on the demurrer, which judgment remained unsatisfied. Notice of judgment was served after the commencement of the first and prior to the second action:

Held, that the plea was not sustained; also that the former judgment was not a bar. (*Porter agt. Kingsbury, 77 N. Y., 164.*)

3. Also, *held*, that an appeal brought in the first action, after the commencement of the second, had no retroactive effect, so as to sustain the plea. (*Id.*)

4. An action was brought by a corporation to recover possession of personal property in which a claim for the immediate delivery of the property was made. A receiver of the corporation was subsequently appointed and was substituted as plaintiff in its stead; judgment was rendered in favor of defendant, in the usual form, for a return of the property or for its value, and execution was issued thereon, which was returned unsatisfied. In an action upon the undertaking given by said plaintiff upon such claim, *held*, that defendant could not object that the execution was irregularly issued, it being against an officer of the court, and issued without leave; that if the execution was improperly issued it could only be

vacated by motion made for that purpose, (*Harrison agt. Wilkin, 78 N. Y., 890.*)

5. The defendants in a replevin suit stipulated that the property was, at the time of the commencement of that action, in their possession:

Held, that they were not estopped thereby in the action upon the undertaking. (*Id.*)

6. It is no defense to an action upon such an undertaking that the property is in such position that it cannot be reached; the undertaking can only be satisfied by a redelivery of the property, or by payment of the judgment. (*Id.*)

VENUE.

1. Where two causes of action, described in the complaint, related to real property situated in the county of Kings, and the other causes of action related to personal property:

Held, that the place of trial should be changed from New York, where it was improperly laid, to the county of Kings. (*Fletcher agt. Cooper, ante, 373.*)

2. Section 982 of the Code of Civil Procedure considered. (*Id.*)

WAIVER.

1. *It seems*, that where, at the close of the evidence upon a jury trial, both parties ask the court to direct a verdict in their favor respectively, it will be assumed that they intend to waive the right of submission to the jury, and consent that the court shall decide the questions of law and fact involved. (*Kochler agt. Adler, 78 N. Y., 287.*)
2. As to whether when, after a pardon, the judgment in a criminal action is affirmed by reason of proceedings upon the part of the

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defendant, he will be deemed to have waived the benefit of the pardon, *quære*. (*Highmy* agt. *People*, 78 N. Y., 830.)

3. The calling of a witness is not a waiver of the right to object to testimony sought to be drawn out on cross-examination, which is incompetent under section 899 of Code of Procedure. (*See Miller* agt. *Montgomery*, 78 N. Y., 282.)

4. A provision in policy of life insurance, limiting time for bringing suit thereon, not waived by receipt of costs in former action on policy where complaint was dismissed, or by stipulation therein extending time. (*See Arthur* agt. *H. F. Ins. Co.*, 78 N. Y., 462.)

5. A notice declining a defective offer of judgment, without pointing out defect, is not a waiver thereof. (*See Rigys* agt. *Waydell*, 78 N. Y., 586.)

WILL.

1. The second clause of the will provided: "II. I give and bequeath unto E. H. D., son of W. C. D., deceased, the sum of ten thousand dollars in trust, for the sole use and benefit of his two daughters" (naming them), "to be given to them at such times and in such sums as he shall think proper, share and share alike. If either of them die before receiving their share, then the balance is to be given to the survivor:"

Held, that there is no such ambiguity or uncertainty as makes it impossible to ascertain the intention of the testator, nor is the trust void as being contrary to the provision of the statute. There is no suspension of the power of alienation beyond two lives in being under any circumstances. The trust terminates as to one-half of the legacy upon the death of the first of the beneficiaries, and as to the balance, it terminates

upon the death of the survivor. Under no circumstances could the trustee hold any portion of the legacy after the death of the survivor. (*Kerr* agt. *Dougherty*, *ante*, 44.)

2. The fifth clause of the will is as follows: "V. I give and bequeath unto the directors of the Union Theological Seminary of the city of New York, the sum of ten thousand dollars, to be invested as a permanent fund in stocks or bonds of the United States or of the state of New York, the interest of which shall be given as support to such student or students of said seminary studying with a view to the Christian ministry as shall be selected for the gift by the directors:

Held, that the objection that the legacy being given as support to the students of the seminary, which is not one of the specified purposes of the incorporation of the seminary, cannot be maintained, because, if the object of the corporation is the instruction in theology, &c., the support of such students would seem to be included in the general scope of the purposes of an institution of that description.

Held, also, that the objection that this legacy is void, because no purposes, whatever, have been enumerated in the act establishing this corporation, and no object to be attained by the creation of the same is set forth in its charter, is untenable, the "title" of the act of incorporation sufficiently indicates the purposes and object to be attained by the creation of the same. The act incorporates the Union Theological Seminary. The purposes of the institution are distinctly set forth in the title of the act of incorporation, giving to the words "Theological Seminary" the meaning ordinarily applied thereto. (*Id.*)

3. The seventh clause of the will is as follows: "VII. I give and be-

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queath unto the Presbyterian Board of Home Missions the sum of five thousand dollars : ”

Held, that, a corporation which is the successor and representative of another corporation cannot enforce the payment of a legacy which the original corporation had no power to receive. The legacy is, therefore, void, for the reason that the devise or bequest was not executed at least two months before the death of the testator, as provided by the act of 1862 incorporating the Presbyterian Committee of Home Missions of which corporation the Presbyterian Board of Home Missions is the successor. (*Id.*)

4. The eighth clause of the will is as follows : “VIII. I give and bequeath unto the New York Bible Society the sum of one thousand dollars : ”

Held, that, as this corporation was formed under the general act of 1848, this bequest cannot be sustained, the will of the testator having been made less than two months prior to his death. The act of 1860 does not affect or restrict the operation of the two months’ clause of section 6 of the act of 1848. (*Id.*)

5. The tenth clause of the will is as follows : “X. I give and bequeath unto the Trustees of the General Assembly of the Presbyterian Church of the United States of America, for the use of the fund of Disabled Ministers, the sum of five thousand dollars : ”

Held, that a bequest, such as is now under consideration, is, if made by a citizen of Pennsylvania, beyond all question void.

Held, further, that it appearing that this bequest being in contravention of the act of the general assembly of Pennsylvania, passed in 1855, is void in Pennsylvania, the domicile of the legatee, it is consequently void in New York, the domicile of the testator. (*Id.*)

6. If the law of the testator’s domicile in terms forbid bequests for any particular purpose, or in any other way limits the capacity of the testator in the disposal of his property by will, a gift in contravention of the law of the testator’s domicile would be void *everywhere*. (*Id.*)

7. The legacy contained in the twelfth article of the will, of \$1,000 to the Sabbath schools of the Scotch Presbyterian Church, cannot be supported. There is no beneficiary named who has the power to take. It would be a great stretch of construction to put in the name of the Scotch Presbyterian Church as beneficiary, limiting the use of that legacy to the Sabbath schools. (*Id.*)

8. Where, as in this case, the right of corporations to take by devise or bequest is restricted by the law of their incorporation, and is thereby made subject either to all the provisions of law relating to devises and bequests, or subject to the general laws of the state:

Held, that the legacies to the Union Theological Seminary, the Presbyterian Board of Home Missions, the New York City Mission and Tract Society and the Presbyterian Hospital are void by reason of the provisions of section 6 of the act of 1848, the will of the testator having been made less than two months prior to his death. (*Id.*)

9. As the limitation in section 6 of the act of 1848 still exists, not having been affected or restricted by the statute of 1860, where the privileges of a corporation are made expressly subject to any and all provisions of law (as was the case in respect to the above corporations), they cannot be exempted from the operation of this provision. (*Id.*)

10. The direction that “the legacies are to be paid as soon as the

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amounts can be collected out of funds now invested on bond and mortgage at the city of Grand Rapids, Michigan," requires that both the principal and interest of the property, as fast as received, should form the fund out of which the legacies should be paid. (*Id.*)

11. There is no valid objection to the validity of the bequest to the widow during her life of the net income of the estate after the payment of the legacies. The testator intended to give to his widow the income of all the estate after the payment of the legacies, and the executors named in the will are the trustees under the will to hold the estate during the lifetime of the widow and collect the income therefrom, and pay the same to her during her life. This evident intention of the testator cannot be defeated because of the failure of certain of the legacies to vest. There is no rule of construction which imposes such a penalty because a will contains an invalid legacy. (*Id.*)

12. The eighteenth clause of the will is as follows: "XVIII. I give and bequeath all the principal left of my estate after the death of my wife, Amelia Kerr, to the societies, seminary or institutions named in the fifth, sixth, seventh, ninth and tenth articles or bequests, to be divided according to the several amounts so bequeathed *pro rata*:"

Held, that, the above bequests are subject to the act of 1860, and are valid only to the extent of one half of the estate of the testator, the valid legacies previously given being included in that one-half.

Held, also, that the residuum is not given to these corporations as a class, but that the proportion of each is distinctly specified in the will, and that, if any of the bequests are void, as to such bequests, the testator has died intestate and they must be distributed under the statute of distribution.

Held, further, that the bequests in the fifth article of the will to the Union Theological Seminary, and in the seventh article thereof to the Presbyterian Board of Home Missions, and in the eighth article thereof to the New York City Bible Society, and in the ninth article thereof, to the New York City Mission and Tract Society, and in the tenth article thereof to the Trustees of the General Assembly of the Presbyterian Church, &c., and in the twelfth article of the will to the Sabbath School of the Scotch Presbyterian Church, and in the thirteenth article of the will to the Presbyterian Hospital, are void and that the testator has died intestate as to the sums mentioned in said void bequests, and the same must be distributed to his widow and next of kin, according to the statute of distribution. (*Id.*)

13. Where the testator, by his will, gave his son T. H. S. \$10,000, in trust, and directed him to put the same at interest on good security, and with the interest thereof, or so much as might be necessary for that purpose, to support and maintain the testator's daughter, A. S., in a decent and comfortable manner, or at his discretion to give and pay to her annually the whole of the interest thereof; and, at her decease, the testator gave the said \$10,000 to all the children of A. S., then living, equally, but if she should die without lawful issue then living, the will gave the same, equally, to his son, daughter and grandson, naming them, and to their legal representatives, respectively. A. S. was a lunatic and so remained until her death. She died without issue. The income of the \$10,000 was more than sufficient to pay for her proper support, and several thousand dollars of unexpended income had accumulated at the time of her death in the hands of the trustee:

Held, that accumulated income, arising under the facts above indi-

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cated, should go to those entitled to the principal sum from which the income was derived; that as to this fund of \$10,000, which had been carved out of his estate by the testator and distinctly set apart to be invested, and which after the death of his daughter was to be paid to the persons named by him, the same should carry with it to the legatees the interest or income which it had earned, and which was not expended for his daughter's maintenance. (*Ellingwood* agt. *Beare*, ante, 503.)

WITNESSES.

1. An order requiring a party to an action to appear for examination before trial, under the provisions of the Code of Civil Procedure (*new Code*, sec. 870, *et seq.*), must be served personally upon him; a service on his attorney is not sufficient to give the court jurisdiction to punish him for not obeying the order. (*Tobo* agt. *Baker*, 77 N. Y., 88.)
2. The provision of the act of 1851 (sec. 88, chap. 184, *Laws of 1851*) in reference to the survey and measurement of land, which prohibits a surveyor from testifying "respecting the survey or measurement of lands" made by him, unless he shall make oath, if required, that the chain or measure used by him conformed to the state standards, applies only to surface surveys and measurements, not to measurements as to the quantity of material taken from an excavation. (*McManus* agt. *Gavin*, 77 N. Y., 86.)
3. The statute being restrictive of a common law rule should not be extended beyond its fair import and intent. (*Id.*)
4. A conviction of a person of a felony in another state does not render him incompetent as a wit-

ness here. (*Nat. Tr. Co.* agt. *Gleason*, 77 N. Y., 400.)

5. This rule is not affected by the fact that at the time he is offered as a witness the term of his sentence has not expired. (*Id.*)
6. While the evidence of an accomplice should be carefully scrutinized, it is for the jury to determine what weight should be given to it. (*N. Y. Guar. and Ind. Co.* agt. *Gleason*, 78 N. Y., 504.)
7. Whether more weight should be given to the testimony of two accomplices, and whether and to what extent they corroborate each other are matters for the jury. (*Id.*)

WRIT OF ASSISTANCE.

1. At 9 A. M., on the 18th day of May, 1874, one Fountain entered a judgment in his favor, in an action of ejectment brought by him against one Scudder to recover the possession of a house and lot in Elmira. A writ of possession was issued thereon to the sheriff, requiring him to deliver possession, "without delay," in pursuance of which he, accompanied by one Arnot, the assignee of Fountain's right, went to the house, told Scudder that he wanted immediate possession, refused his request for a delay, took the keys of the front and back doors and put them in his pocket, and proceeded, with his assistant, to remove Scudder's property from the house.

At 1 P. M., of the same day, he was served with an order staying all proceedings upon the judgment and the writ, pending the decision of a motion for a new trial. After he had read the order he stopped the further removal of the goods, told a person in the house that she had better go out, as he was going to lock up the house, and having

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locked the doors went away, leaving a deputy in possession.

Upon an appeal from an order adjudging the sheriff guilty of a contempt in violating the stay of proceedings, and imposing a fine upon him therefor; *held*, that Arnot, as the assignee of Fountain, was, by virtue of the judgment, entitled to take possession of the premises if he could do so peaceably.

That the sheriff could take possession as his agent, and, having done so, rightfully commenced to remove the defendant's goods. (*People ex rel. Scudder agt. Cooper*, 20 Hun, 486.)

2. That when served with the order staying all further proceedings Arnot was already, by virtue of what had been done, in possession of the premises; that the sheriff was not required to turn out Arnot and reinstate Scudder in possession, and that his failure so to do did not render him guilty of a contempt. (*Id.*)

WRIT OF PROHIBITION.

1. There can be no appeal from an order of the marine court granting a new trial without the stipulation required by the act of 1874. Nor have the provisions of chapter 479 of the Laws of 1875 abrogated or repealed the provisions of the act

of 1874. (*People ex rel. Salles agt. Talcott, ante*, 269.)

2. The absence of the stipulation and the appeal from the order assuming the appeal was regular under the act of 1875, took the case out of the provisions of the act of 1874 and left the court of common pleas to the exercise of the discretion vested in that court in such cases by subdivision 2 of section 43 of chapter 479 of the Laws of 1875, and the exercise of that discretion is not reviewable at a special term of this court on the extraordinary writ of prohibition. (*Id.*)
3. The relator, if aggrieved by the judgment of the court of common pleas because of any irregularity of form, has a plain remedy by application to that tribunal for the correction of the judgment, this court should not interfere by prohibition while so simple and easy a remedy lies open to the relator. (*Id.*)
4. As there was no lawful appeal which could give the court of common pleas jurisdiction under the statute, the case has remained in legal contemplation in the marine court, subject to the order of the general term granting a new trial, and this court will not interfere with the functions of that tribunal in this case by a writ of prohibition. (*Id.*)

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Ex. G. A. A.

ERRATA.

In the case of *Fletcher* agt. *Cooper* (*ante*, page 874), sixth line of the opinion, for the word "fourth," read "*first*;" for the word "second," on the eighth line from the bottom, read "*rescind*."

In the case of *Tripp et al.* agt. *Saunders* (*ante*, page 880), first line, for the word "their," read "*these*."

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